UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 97CV1113K(W)**
	)	
JAMES K. BREMMER,	)	
	)	ENTERED ON DOCKET
Defendant.	)	
		DATE APR 10 1998

DEFAULT JUDGMENT

This matter comes on for consideration this 8 day of April, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, James K. Bremmer, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, James K. Bremmer, was served with Summons and Complaint on February 19, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, James K. Bremmer, for the principal amount of $2,712.46, plus accrued interest of $2,152.03, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

(6)

$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/llf

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUNA M. LISTENBEE,
SSN: 446-36-4072 and 445-32-2698W

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-C-36-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 9th day of April 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(19)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUNA M. LISTENBEE,
SSN: 446-3[illegible]4072 and 445-32-2698W

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-C-36-J

ORDER[2/]

Plaintiff, Juna M. Listenbee, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because (1) the ALJ erred in his Step Four analysis, (2) Plaintiff suffers from high blood pressure aggravated by stress, yet the ALJ failed to preclude jobs which cause stress, and (3) the record supports a denial at Step Five because Plaintiff is presumptively disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Administrative Law Judge Larry C. Marcy (hereafter "ALJ") concluded that Plaintiff was not disabled on August 22, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review. [R. at 5].

(18)

I. PLAINTIFF'S BACKGROUND

Plaintiff was born July 3, 1936, and was 59 years old at the time of the hearing before the ALJ. [R. at 38]. Plaintiff graduated from high school and completed two years of college courses. [R. at 38].

Plaintiff testified that she was very tired, suffered from fatigue, pain and headaches. [R. at 40]. Plaintiff stated that she generally awoke around 7:00 a.m., bathed and straightened her house. Plaintiff's two grandchildren came to her house around 10:00 a.m., and Plaintiff took care of them during the day until approximately 5:30 p.m. [R. at 43]. Plaintiff stated that she could lift 20 pounds, walk four blocks, and sit for approximately four hours.[4/]

Plaintiff testified that she has high blood pressure but has difficulty purchasing the medicine which she needs to control her high blood pressure. [R. at 46-51]. One of Plaintiff's doctors noted that she was active and exercised 20-30 minutes each day. [R. at 118]. On one of her disability reports, Plaintiff noted that "if someone would give me a job I would work." [R. at 180].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

[4/] Plaintiff, in her brief, states that she can sit for four hours in a recliner. The testimony at the hearing is not as definite as Plaintiff's assertion. [R. at 55-56].

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.[5/] See 20 C.F.R. § 404.1520.

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of

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[5/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[6/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

[6/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

III. THE ALJ'S DECISION

In this case, the ALJ concluded that Plaintiff was not disabled at Step Four of the sequential evaluation. The ALJ found that Plaintiff could perform sedentary or light work with the additional requirement that Plaintiff be permitted to sit or stand once each hour. [R. at 24]. The ALJ discounted Plaintiff's complaints of fatigue, dizziness and pain for several reasons. [R. at 25-26]. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could return to her past relevant work as a credit clerk. [R. at 26]. The ALJ alternatively found that Plaintiff could perform several other jobs in the national economy based on her transferrable skills.

IV. REVIEW

Step Four

Plaintiff generally outlines the procedure followed at Step Four of the sequential evaluation and asserts that the ALJ in this case failed to follow that procedure. Plaintiff notes that the ALJ improperly relied on the testimony of a vocational expert at Step Four.

At Step Four, the ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

In this case, the ALJ determined Plaintiff's RFC, and based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could continue to perform her past relevant work as a credit clerk. The Tenth Circuit Court of Appeals has previously noted that this practice of delegating the Step Four analysis to the vocational expert should be discouraged. See Winfrey v. Chater, 92 F.3d 1017,1025 (10th Cir. 1996). The Court declines to further elaborate on this issue, however, because the decision of the Commissioner can be affirmed at Step Five. See Berna v. Chater, 101 F.3d 631 (10th Cir. 1966) (affirming decision by Commissioner on alternative grounds at Step Five).

Stress and High Blood Pressure

Plaintiff asserts that the ALJ failed to properly consider Plaintiff's need to limit her stress. Plaintiff states that Plaintiff has high blood pressure, that "it is well-known that increased stress will cause blood pressure to rise," and that the vocational expert concluded that Plaintiff could not perform her past relevant work as a credit clerk if she was limited to no stress.

The record contains no evidence that increased stress will cause Plaintiff's blood pressure to rise. Plaintiff was under no specific restrictions from her doctors, although

Plaintiff's doctors cautioned Plaintiff to take her blood pressure medication.[7/] The ALJ additionally discussed Plaintiff's credibility and noted that although Plaintiff testified that she was constantly fatigued she was able to take care of her grandchildren during the day, one of her physicians stated she was exercising 20-30 minutes each day, that she could walk up to four blocks and that she drove to the hearing. The ALJ analyzed Plaintiff's medical records and concluded that Plaintiff could control her hypertension if she took her medication. The ALJ did not find that Plaintiff required a stress-free environment for work, and did not conclude that Plaintiff's blood pressure would be elevated if she were subjected to stress. The ALJ's findings are supported by substantial evidence.

Step Five

The ALJ additionally concluded that Plaintiff was not disabled at Step Five. The vocational expert testified that Plaintiff's past relevant work provided Plaintiff with transferable skills such as knowledge of credit work, retail sales, and credit application procedures. The ALJ noted that, based on the Grids, the Plaintiff was not disabled. The ALJ further referred to the testimony of the vocational expert, based on a hypothetical question posed by the ALJ, and concluded that Plaintiff was qualified for the jobs of general office clerk (7,500 state jobs) and sedentary cashier (1,200) jobs.

7/ The record contains some indication that Plaintiff occasionally had difficulty purchasing her blood pressure medication. Plaintiff does not raise this issue on appeal. Plaintiff testified that she could afford her most recently prescribed medication for high blood pressure. [R. at 47]. One of Plaintiff's doctors noted on one of her records that Plaintiff previously could not afford her medications but that she "now she can afford it." [R. at 114].

Plaintiff notes that she was 59-years-old at the time of the decision by the ALJ. Pursuant to the Grids, therefore, Plaintiff asserts that she would qualify as presumptively disabled "unless she has acquired skills which are highly marketable or which are transferable to jobs which require little vocational adjustment." Plaintiff's Brief at 4. Plaintiff acknowledges that the vocational expert testified that Plaintiff had skills which were transferable to the jobs of general office work and cashier. However, Plaintiff asserts that the vocational expert testified that the job of cashier would be eliminated and the job of office clerk would be cut in half if Plaintiff was limited to low stress work. Plaintiff therefore asserts that these jobs are virtually eliminated and do not provide substantial evidence to support the Commissioner's decision that Plaintiff is not disabled.

Plaintiff was 59-years-old at the time of the decision by the ALJ. Pursuant to the Grids, an individual of that age is categorized as "advanced age." Under the applicable Grid, an individual capable of performing light work who is of "advanced age" and has transferable skills is not disabled.[8/] Plaintiff suggests that due to her need to avoid stress, she is incapable of performing the requirements of the two jobs listed by the ALJ. However, as noted above, the ALJ did not find that Plaintiff's RFC was limited by a need to avoid stress, and the record supports the ALJ's finding.

[8/] Plaintiff seems to suggest that if the transferable skills are not highly marketable, Plaintiff is disabled. Such a requirement may be imposed if Plaintiff were in a different age category (advanced age, closely approaching retirement age) or if Plaintiff was limited to sedentary work. See, e.g., Nielson v. Sullivan, 992 F.2d 1118 (10th Cir. 1993). However, in this case, the ALJ concluded that Plaintiff could perform light or sedentary work, and Plaintiff's age is "advanced age" but Plaintiff is not yet "closely approaching retirement age."

Accordingly, the Commissioner's decision is **AFFIRMED.**

Dated this 8 day of April 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JULIE COOK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 98-C-160-B
	)	
MIDWESTERN OFFICE PRODUCTS, a corporation, d/b/a SCOTT RICE,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Motion to Dismiss filed by defendant Midwestern Office Products d/b/a Scott Rice ("Scott Rice") (Docket No. 8). In her complaint, plaintiff Julie Cook brings four claims against her former employer Scott Rice: (1) retaliatory discharge in violation of Oklahoma public policy; (2) violation of the Oklahoma Anti-Discrimination Act, 25 O.S. §1301 *et seq.*; (3) gender discrimination in violation of the Pregnancy Discrimination Act and Title VII; and (4) violation of the Equal Pay Act and Fair Labor Standards Act .

Scott Rice moves to dismiss claims (1) and (2) for failure to state a claim and seeks costs and fees incurred in submitting the motion. Fed.R.Civ.P. 12(b)(6). After reviewing recent decisions by this Court Plaintiff concedes that although she has a good faith belief in the merit of the state law claims, she is unlikely to prevail on those claims. Plaintiff thus dismisses her *Burk* and Oklahoma Anti-Discrimination Act claims without prejudice.

Plaintiff's voluntary dismissal of her state law claims renders defendant's motion to dismiss moot. Each party is to bear its own costs and attorney fees.

IT IS SO ORDERED this 8 day of April, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH GENE GREEN,

Petitioner,

vs.

MICHAEL ADDISON,

Respondent

No. 97-C-30-B

ORDER

Before the Court is Petitioner Joseph Gene Green's ("Green") Objection to the Report and Recommendation of Magistrate Judge John L. Wagner ("R&R") (Docket #11) to dismiss his Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1). The Court adopts the findings of the R&R and denies Green's petition.

Green pled guilty on April 18, 1994 to possession of a controlled substance with intent to distribute, possession of marijuana, and possession of drug paraphernalia in Tulsa County District Court, Case No. CF-93-4251. He was sentenced to 20 years imprisonment. He did not move to withdraw his guilty plea or file an appeal with the Oklahoma Court of Criminal Appeals within the requisite time period. However, he has filed several applications for post-conviction relief in the District Court of Tulsa County.

Green asserts that he pled guilty because of a plea agreement with the State that if he did so the State would not prosecute his wife and co-defendant, Debbie Green, on the same charges. In a deposition, Dan Kramer, the attorney who represented Green during his prosecution in CF-93-4251, attests that there was a plea agreement between Green and the Prosecution whereby

Green agreed to plead guilty "with the understanding that charges against Mr. Green's wife, Debbie Green, would be dismissed." Kramer further attests that the "Tulsa County District Attorney later determined that Mrs. Green had not been sufficiently cooperative and had acquired additional felony charges and therefore the agreement was not honored and Mrs. Green was convicted and sentenced to 20 years in the Department of Correction."

Green asserts that "[h]e only plead [sic] guilty because of his love and passion for his wife." Green also provides a copy of an affidavit given by his wife asserting "Joseph Gene Green never was in possession of the controlled drugs or in control of them, nor was he, 'Joseph Gene Green,' involved in any distribution." Green alleges that the State breached the plea agreement by prosecuting his wife as a result of her later felony, which resulted in her receiving two concurrent sentences of 20 years. His wife was sentenced on August 12, 1994.

Green correctly points out that the State did not allegedly breach the plea agreement until after it was too late for him to timely move the court to withdraw his guilty plea. When he filed his first application for post-conviction relief raising that issue, it was not addressed by the district court. As a result of his second application for post-conviction relief, his sentence was modified to 15 years; however, the decision did not state the factual or legal basis for the modification so no appeal could have been filed. In his third post-conviction application Green informed the court that he was not present at the hearing on his second application and thus had no knowledge of what had transpired there. The court found that the issue of the breached plea agreement had been waived.

The United States Supreme Court has held that:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant

> to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). In the present case, Green has demonstrated cause and prejudice for his failure to raise his claims on direct appeal, since his attempts to withdraw his guilty plea based upon his assertion that the State breached the plea agreement have been to no avail as a result of the state's application of the procedural bar and an unexplained five-year sentence reduction.

The Tenth Circuit has recognized "that threats to prosecute or promises of leniency to third persons to induce guilty pleas can pose a danger of coercion. Aside from requiring special care to insure that the plea was in fact entered voluntarily and was not the product of coercion, we must respect the defendant's choice and '[i]f [an accused] elects to sacrifice himself for such motives, that is his choice....'" *Mosier v. Murphy*, 790 F.2d 62, 66 (10th Cir. 1986), quoting *Kent v. United States*, 272 F.2d 795, 798 (1st Cir.1959). The court noted "that the inclusion of such third persons can increase the leverage possessed by prosecutors and therefore imposes upon them a high standard of good faith." *Id.* citing *United States v. Nuckols*, 606 F.2d 566 (5th Cir.1979).

The colloquy between the district judge who accepted Green's plea of guilty and Green clearly establishes the voluntariness of Green's plea of guilt. He not only affirmed his guilt for the crimes of which he was accused but he failed to avail himself of several opportunities to discuss any misgivings he may have had with the judge. Furthermore, the affidavit of Dan Kramer, Green's attorney, supports the State's contention that the plea agreement was conditioned on

Mrs. Green's cooperation, which she ultimately failed to give.

Although a plea agreement must be construed and adhered to as would any contract, *see United States v. Ballis*, 28 F.3d 1399, 1409 (5th Cir. 1994), the State did not breach the plea agreement struck with Green. Green admits that his wife committed an additional felony after his incarceration for which she received a twenty-year sentence to run concurrently with the twenty-year term for the offense to which Green himself pled guilty. Green has provided no substantiation for his assertion that his wife's cooperation and abstention from additional criminal activity were not a part of the plea agreement.

Therefore, Green's Petition for a Writ of Habeas Corpus is DENIED.

IT IS SO ORDERED this 8th day of April, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VERNON RAY CLARK, **SSN: 512-36-7337,**	)	
Plaintiff,	)	
v.	)	**Case No. 96-C-0992-B (E)**
KENNETH S. APFEL, **Commissioner of Social Security,**[1]	)	ENTERED ON DOCKET
Defendant.	)	DATE APR 09 1998

PROPOSED FINDINGS AND RECOMMENDATIONS[2]

Claimant, Vernon Ray Clark, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of Social Security ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.[3] Claimant asserts that the Commissioner erred where substantial evidence did not support the finding of the Administrative Law Judge ("ALJ") that claimant was not disabled, specifically in regard to (1) the ALJ's finding that claimant could return to his past relevant work; (2) the ALJ's lack of proper consideration of claimant's combination of

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1 Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

2 By minute order dated February 4, 1998, this case was referred to the undersigned for all further proceedings in accordance with her jurisdiction pursuant to the Federal Rules of Civil Procedure.

3 On January 11, 1993, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application for benefits was denied in its entirety initially (February 12, 1993), and on reconsideration (March 26, 1993). A hearing before Administrative Law Judge James D. Jordan ("ALJ") was held January 5, 1994, in Tulsa, Oklahoma. By decision dated December 15, 1994, the ALJ found that claimant was not disabled on or before December 31, 1993 (the date claimant was last insured for disability benefits under Title II). On August 30, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

exertional and non-exertional impairments; and (3) the ALJ's failure to find that claimant does not have the ability to perform other work which exists in significant numbers in the national economy. For the reasons discussed below, the undersigned recommends that the District Court **AFFIRM** the decision of the Commissioner.

I. CLAIMANT'S BACKGROUND

Claimant was born on May 5, 1932. (R. 74) He grew up on a wheat farm in Galva, Kansas and served in the United States Army during the Korean War. (R. 109) After his military service, claimant attended college at Kansas State University and earned a degree in electrical engineering. Claimant worked as an electrical engineer from 1959 to 1986, the last 21 years at Phillips Petroleum Company in Bartlesville, Oklahoma. Id. In June, 1986, claimant took early retirement from Phillips to start a nursery, landscape, and lawn maintenance business with his wife in Bartlesville. Id. On July 9, 1992, claimant suffered a heart attack. (R. 151) Claimant claims that the ongoing effects of his heart disease have caused pain, shortness of breath, weakness, fatigue, loss of stamina, and stress, all of which have rendered him disabled within the meaning of the Social Security Act. (R. 116)

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of

substantial gainful work in the national economy...." Id., § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.[4]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1486 (10th Cir. 1991).

The only issue now before the Court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant was not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 216, 83 L. Ed. 126 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir.

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[4] Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R. Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account his age, education, work experience, and RFC--can perform. See Diaz v. Sec. of H.H.S., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

1981). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at Step Four of the sequential evaluation process. The ALJ found that claimant had the residual functional capacity (RFC) to perform his past relevant work as an engineer, as that work is generally performed in the national economy. Having found that claimant had not met his Step Four burden, the ALJ concluded that claimant was not disabled under the Social Security Act.

IV. MEDICAL HISTORY OF CLAIMANT

Claimant's alleged onset date is July 9, 1992. (R. 15) It is uncontested that claimant's last-insured date, for purposes of social security benefits, is December 31, 1993. (R. 18)

On July 9, 1992, claimant suffered a heart attack and was taken to the Emergency Room of Memorial Hospital in McPherson, Kansas. (R. 151) Later that day, claimant was transferred to St. Francis Regional Medical Center in Tulsa, Oklahoma, where he was diagnosed with acute myocardial infarction and a previous history of hypercholesterolemia. (R. 161) Dr. Whitney Reader performed a cardiac catheterization, angioplasty, and atherectomy on claimant. (R. 161-162) Claimant was discharged from St. Francis on July 15, 1992. (R. 161)

Following claimant's hospitalization, claimant was treated by Dr. Stanley Defehr in Bartlesville. Claimant was first seen by Dr. Defehr on July 17, 1992. (R. 180) On July 24, 1992, Dr. Defehr performed an exercise test (treadmill) and diagnosed claimant as having no angina, no progressive EKG changes, and normal blood pressure. (R. 190) After seeing claimant on August

14, 1992, Dr. Defehr reported in his notes that claimant said that he has been feeling well and had started mowing lawns. (R. 180) On September 15, 1992, Dr. Defehr noted that claimant stated that he had been mowing 35 lawns a week. Id.

In a report to claimant's insurance company dated November 24, 1992, Dr. Defehr diagnosed claimant as having a cardiac functional capacity of Class II (slight limitation) according to standards set out by the American Heart Association. Dr. Defehr checked a box in the report indicating that claimant was totally disabled, but next to the box wrote "from present occupation." (R. 184)

On December 15, 1992, Dr. Defehr performed another treadmill test on claimant, noting mild angina, mild dyspnea, no arrythmias, and normal blood pressure. (R. 206) Claimant applied for social security disability benefits on January 11, 1993. On February 1, 1993, a Social Security medical consultant, Dr. Anthony Vallis, performed an RFC assessment on claimant. (R. 81-90) Dr. Vallis concluded that claimant could lift and/or carry 10 pounds frequently and 20 pounds occasionally. Id. Claimant's application was denied initially on February 12, 1993 and upon reconsideration on February 18, 1993.

Claimant saw Dr. Defehr on February 19, 1993 and reported back problems and that claimant's arms felt heavy when he walked. (R. 180) However, Dr. Defehr stated in his notes "I am really not too impressed with [claimant's] symptoms as far as any new pathology." Id.

A third treadmill test was performed by Dr. Defehr on March 29, 1993. According to Dr. Defehr, the treadmill indicated fatigue, but no angina, no arrythmias, and normal blood pressure. (R. 182) Dr. Defehr saw claimant again on May 25, 1993, noting that claimant's blood pressure is "fairly well controlled but still borderline at 150/90." (R. 222) Dr. Defehr stated in his notes that claimant "has been extremely compulsive about taking his medications, staying with his diet, trying to stick

with an exercise program." Id. On July 7, 1993, Dr. Defehr noted an increase in claimant's hypertension and reported that claimant had said that he had not been doing much work and no mowing or pushing. (R. 222) Dr. Defehr saw claimant on September 30, 1993, recording that claimant's blood pressure was much better and his lipids seemed to be doing well. (R. 221)

Dr. Defehr performed a fourth treadmill test on claimant on December 2, 1993. Again, claimant had to stop from fatigue, but Dr. Defehr diagnosed no angina and borderline blood pressure. (R. 230)

Finally, there is evidence in the record that, on January 5, 1995, claimant was admitted to the Emergency Room at Jane Phillips Episcopal-Memorial Medical Center in Bartlesville, complaining of severe stomach pain. (R. 249, 254) Claimant was diagnosed with gastrointestinitis and abdominal pain. Id. Nothing in the record indicates that these 1995 difficulties tend to establish an impairment more significant than that already established and which began during or before claimant's relevant time period. Id.

V. REVIEW

A. The Listings

Substantial evidence supports the conclusion of the ALJ that claimant's impairment does not meet or equal an impairment included in the Listing of Impairments published in Appendix 1 of Subpart P, Part 404, 20 C.F.R.. Persons suffering from a listed impairment are determined to be disabled without further inquiry. In his report, the ALJ found that "[t]he record reflects the claimant has a vocationally-severe impairment due to heart disease, however, [sic] this impairment does not meet or equal an impairment found in [the Listings]. (R. 15) The ALJ compared claimant's condition to the listing for ischemic heart disease contained in 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 4.04.

Section 4.04 requires a showing of chest discomfort associated with myorcardial ischemia and, of possibilities applicable to claimant, one of two other requirements:

> B. Impaired myocardial function, documented by evidence . . . of hypokinetic, akinetic, or dyskinetic myocardial free wall or septal wall motion with left ventricular ejection fraction of 30 percent or less, and an evaluating program physician . . . has concluded that performance of exercise testing would present a significant risk to the individual, and resulting in marked limitation of physical activity, as demonstrated by fatigue, palpitation, dyspnea, or anginal discomfort on ordinary physical activity, even though the individual is comfortable at rest;
>
> OR
>
> C. Coronary artery disease, demonstrated by angiography, . . . and an evaluating program physician . . . has concluded that performance of exercise testing would present a significant risk to the individual, with both . . .
>
> 1. Angiographic evidence revealing: (b) 70 percent or more narrowing of [a] nonbypassed coronary artery [other than the left main coronary artery, which is dealt with separately]; . . .
>
> and
>
> 2. Resulting in marked limitation of physical activity, as demonstrated by fatigue, palpitation, dyspnea, or anginal discomfort on ordinary physical activity, even though the individual is comfortable at rest.

Comparing the evidence of claimant's impairment to the requirements set out in Section 4.04(B), the ALJ found:

> There is no medical evidence that exercise testing has ever been considered risky for this claimant, and, in fact, the file contains records of four exercise tolerance tests after the heart attack. The claimant does not meet all the requirements of this listing. He does have mild to moderate hypokinesis of the interior wall, but ejection fraction was measured at 50% (Exhibit 23 page 12). He does not have marked limitation of physical activity.

(R. 16) As to Section 4.04(C), the ALJ also found a disparity between claimant's impairment as proved by claimant and the requirements of the Listings. The ALJ stated:

> Listing 4.04C[] . . . also requires that a physician has concluded that performance of exercise testing would present a significant risk to the individual and . . . 70 percent or more narrowing of another nonbypassed coronary artery and resulting in marked

> limitation of physical activity, etc. The claimant does have a 70 percent blockage of a small vessel, but he does not have the other factors necessary to meet or equal this Listing.

Id. The findings of the ALJ are supported by substantial evidence. There is no evidence of a medical conclusion that exercise testing would present any risk to claimant. As the ALJ noted, four separate treadmill tests have been performed on claimant without incident. This alone precludes claimant from meeting the requirements contained in Sections 4.04(B) and 4.04(C). The evidence does not support a finding that claimant is disabled under Listing 4.04, or any of the other listings dealing with heart disorders.

B. Past Relevant Work

Claimant argues that substantial evidence does not support the determination of the ALJ that claimant could return to his past relevant work. Claimant asserts that his age and the physical requirements of being an on-site electrical engineer in the petroleum industry preclude him from returning to that type of work. This contention is without merit.

A claimant bears the burden of proving disability. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). The claimant's burden includes the Step Four burden of establishing that claimant does not retain the RFC to return to his past relevant work. Potter v. Secretary of Health & Human Servs., 905 F.2d 1346 (10th Cir. 1990); Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989). That burden was not met by claimant in this case.

"Past relevant work is defined as work that (1) occurred within the past fifteen years (the so-called recency requirement), (2) was of sufficient duration to enable the worker to learn to do the job (the so-called duration requirement), and (3) was substantial gainful employment." Jozefowicz v. Heckler, 811 F.2d 1352, 1355 (10th Cir. 1985). Claimant has a college degree in electrical

engineering and worked as an electrical engineer for 27 years before taking early retirement in 1986. (R. 109) From 1986 to 1992 claimant and his wife ran a nursery and lawn maintenance business. Id. Claimant's work as an electrical engineer meets the requirements set forth in Jozefowicz: claimant's work as an electrical engineer ended in 1986 and, thus, occurred within fifteen years of claimant's application for Social Security benefits; claimant's work as an electrical engineer lasted 27 years (or nine of the 15-year recency requirement) and, thus, was of sufficient duration to allow claimant to learn to do the job; and claimant's work as an electrical engineer was substantial gainful employment within the meaning of the Social Security Act. Claimant's work as an electrical engineer is past relevant work for purposes of a determination of Social Security benefits.

Claimant asserts that his work as an in-the-field electrical engineer for Phillips entailed a great deal of lifting and carrying equipment, which his impairment now prevents him from doing. The ALJ found that although claimant could not return to his past relevant work as he performed it at Phillips, claimant could return to the past relevant work of an electrical engineer as that job is performed in the national economy. The ALJ is correct. A finding that a claimant may perform the same type of work as he performed in a previous job, even absent a finding that the claimant may perform the same particular job, is sufficient to support a determination that the claimant may perform his past relevant work. Social Security Ruling 82-61 provides that:

> [A] claimant will be found to be "not disabled" when it is determined that he or she retains the RFC to perform:
> 1. The actual functional demands and job duties of a particular past relevant job; or
> 2. The functional demands and job duties of the occupation as generally required by employers throughout the national economy.

Although Social Security Rulings do not, in and of themselves, bear the force of law, the Tenth Circuit, in Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1050-1051 (10th Cir.

1993), adopted the interpretation of "past relevant work" contained in Social Security Ruling 82-61. That court stated:

> Several other circuits have concluded that the phrase past relevant work includes a claimant's particular past relevant job, as well as the *type* of work claimant performed in the past, as that work is generally performed in the national economy. See Martin v. Sullivan, 901 F.2d 650, 653 (8th Cir.1990) (following the test stated in S.S.R. 82-61 and noting that the First, Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits have all rejected the argument that "a claimant who cannot perform a particular past relevant job cannot perform his past relevant work"); see also Villa v. Heckler, 797 F.2d 794, 798 (9th Cir.1986) (claimant must prove inability to return to former type of job, not just to specific prior job); DeLoatche v. Heckler, 715 F.2d 148, 151 (4th Cir.1983) (same); Orlando v. Heckler, 776 F.2d 209, 215-16 (7th Cir.1985) (adopting S.S.R. 82-61). We find no basis upon which to reject S.S.R. 82-61's interpretation of the phrase past relevant work. Therefore, claimant bears the burden of proving his inability to return to his particular former job and to his former occupation as that occupation is generally performed throughout the national economy.

Andrade, 985 F.2d at 1051. Here, claimant may or may not have proved that he was unable to return to his particular former job as an in-the-field electrical engineer for a petroleum company; however, claimant has not proved that he was unable to return to the occupation of electrical engineer as that occupation is generally performed throughout the national economy.

Substantial evidence supports the ALJ's determination that claimant's RFC is such that claimant can perform his past relevant work. A vocational expert testified at the hearing before the ALJ that the job of electrical engineer, as defined in the Dictionary of Occupational Titles, requires only light exertion. The RFC assessment performed by Dr. Vallis determined that claimant could lift and/or carry 10 pounds frequently and 20 pounds occasionally. (R. 81-90) Thus, the ALJ concluded that claimant is able to perform the light exertion required by an electrical engineering job. (R. 17)

Claimant has presented no evidence that contradicts that finding.[5] Claimant, in his brief, cites to page 184 of the record and asserts that "evidence from [claimant's] treating physician shows that [claimant] is unable to return to his occupation." Plaintiff's Brief (Docket #4) at 2. Page 184 of the record does show that Dr. Defehr, in a report to claimant's insurance company, checked a box indicating that claimant is totally disabled. (R. 184) However, Dr. Defehr wrote "from present occupation" next to the box. Id. Dr. Defehr's comments are clearly limited to stating that claimant is not capable of performing the labor-intensive work required by his job at the nursery. No other diagnosis, comment, or note made by Dr. Defehr, or any other physician, indicates that claimant cannot perform work which requires light exertion.[6]

Nor does claimant's age require a finding that claimant could not return to his past relevant work. Although claimant was 60 years old when he had his heart attack and 61 when his insured status expired, the Social Security regulations do not account age a factor in a determination of

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[5] Nor has claimant successfully presented a challenge to the ALJ's categorization of claimant's occupation as an electrical engineer, as that position is defined in the *Dictionary of Occupational Titles*. Claimant has not shown that "the duties of his prior job were sufficiently distinct from the duties of [an electrical engineer] as described in the *Dictionary* to constitute a different line of work." Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1052 (10th Cir. 1993)(quoting favorably from Villa v. Heckler, 797 F.2d 794, 798 (9th Cir.1986)).

[6] Claimant also reads more into the comments of the vocational expert than is apparent to the undersigned. Claimant argues that he "is easily fatigued and must rest for several hours each afternoon. The vocational expert took this information into account, and stated that [claimant] would not be able to work a full eight hour day. This would preclude [claimant] from returning to his past relevant work." Plaintiff's Brief (Docket #4) at 2 (citation omitted). The record makes clear that the vocational expert had been asked to take all of the testimony at the hearing exactly as given and state whether anything she heard would impact the job base. (R. 67) The vocational expert responded "[t]he other thing that was in testimony was the stamina in being unable to maintain a full eight-hour day, would be a restriction." Id. The comments of the vocational expert merely reflected factual possibilities raised by claimant. The comments did not indicate an agreement with or, in any case, tend to prove claimant's assertion of being unable to perform work of light exertion.

whether a claimant can return to his past relevant work. 20 C.F.R. § 404.1560 governs when vocational factors, such as age, will be considered. Section 404.1560(b) provides:

> Past relevant work. We will first compare your residual functional capacity with the physical and mental demands of the kind of work you have done in the past. If you still had the residual functional capacity to do your past relevant work, we will find that you can still do your past work, and we will determine that you are not disabled, without considering your vocational factors of age, education, and work experience.

20 C.F.R. § 404.1560(b). An analysis of whether claimant's age would negatively affect his ability to find a job--that is, whether claimant's skills are transferrable or highly marketable--is a vocational consideration relevant to the determination at Step Five of the sequential evaluation process. Here, substantial evidence supports the ALJ's determination at Step Four that claimant could return to his past relevant work. Thus, contrary to claimant's assertions, claimant's age need not have been considered.

C. ***Non-Exertional Impairments***

Claimant further asserts that "the ALJ failed to show that [claimant] could perform all of the exertional and non-exertional requirements of light work." Plaintiff's Brief (Docket #4) at 3. Claimant lists, as non-exertional impairments, allegations of pain, high blood pressure, high cholesterol, temperature restrictions, shortness of breath, fatigue, and need for frequent rest. Id.

Contrary to claimant's assertions, it is the claimant's duty to show that claimant could not perform his past relevant work because of the combined effect of claimant's exertional and non-exertional impairments. The ALJ need not show anything beyond substantial evidence to support a determination that claimant did not meet his burden. This, the ALJ did.

The ALJ, in assessing claimant's ability to return to his past relevant work, followed the guidelines for judging credibility and pain set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires the undersigned to consider:

> (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling.

Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995) (internal quotations omitted).

The ALJ found:

> Although the claimant's testimony was frank and sincere, his allegations of total inability to work are not credible to the extent alleged. His daily activities are not significantly limited, and despite complaints of anginal pain, he has not taken nitroglycerin since he was in the hospital in July 1992. On September 15, 1992, he told his treating physician that he was mowing about 35 lawns a week. The treatment notes do not document that any restrictions were placed on the claimant.

(R. 17) The undersigned generally gives great deference to the credibility determinations made by an ALJ. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). Moreover, the Tenth Circuit has stated that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz, 898 F.2d at 777.

Claimant's allegations of disabling pain and non-exertional limitations are not supported by any medical evidence. Not once, according to the medical evidence before the undersigned, did Dr.

Defehr recommend that claimant limit himself to anything approaching a level of inactivity such that claimant could not even perform light work. The evidence of anginal pain, or any other non-exertional limitation, simply does not rise to the point that the undersigned must recommend a finding that the ALJ's determination is not supported by substantial evidence.

Because the ALJ's finding that claimant did not meet his Step Four burden of proving that claimant could not return to his past relevant work is supported by substantial evidence, Step Five of the sequential evaluation process is not reached. Therefore, the undersigned will not consider any of claimant's arguments as to what claimant believes should have happened at Step Five.

VI. CONCLUSION

For the foregoing reasons, the undersigned recommends that the District Court **AFFIRM** the decision of the Commissioner. Any objection to these proposed findings and recommendations must be filed with the Clerk of the Court within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992); Niehaus v. Kansas Bar Ass'n., 793 F.2d 1159, 1164-65 (10th Cir. 1986) (superseded by rule on grounds not relevant to holding on waiver).

DATED this 8th day of April, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 9 Day of April, 1998.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARTY GOSSETT, Plaintiff, vs. STATE OF OKLAHOMA, ex rel. BOARD OF REGENTS FOR LANGSTON UNIVERSITY AND THE AGRICULTURAL AND MECHANICAL, COLLEGES, ERNEST HOLLOWAY as President of Langston University, CAROLYN KORNEGAY as Dean of the School of Nursing of Langston University, Defendants.	)	No. 97-C-115-K

ENTERED ON DOCKET
DATE APR 09 1998

FILED
APR 08 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Motion by the defendants for summary judgment against the plaintiff.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendants and against the plaintiff.

ORDERED THIS DAY OF 7 APRIL, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARTY GOSSETT, Plaintiff, vs. STATE OF OKLAHOMA, ex rel. BOARD OF REGENTS FOR LANGSTON UNIVERSITY AND THE AGRICULTURAL AND MECHANICAL, COLLEGES, ERNEST HOLLOWAY as President of Langston University, CAROLYN KORNEGAY as Dean of the School of Nursing of Langston University, Defendants.	)	No. 97-C-115-K

O R D E R

Before the Court is the motion of the defendants for summary judgment. Plaintiff brings this action pursuant to 42 U.S.C. §1983 and Title IX, 20 U.S.C. §1681(a) for the alleged violation of plaintiff's rights in an academic setting.[1] Plaintiff, a white male, was enrolled in the nursing program at Langston University ("Langston"), on the Rogers University campus in Tulsa, Oklahoma. In the fall semester of 1994, plaintiff received a D grade in the course Nursing Process II. The Langston Nursing School requires that all students make a C or higher grade in every class in order to be permitted to continue in the program. Plaintiff pursued

[1]The introduction of plaintiff's brief in response to the present motion makes passing reference to Title VII, but neither the amended complaint filed September 16, 1997 nor the parties' briefs make any reference to a Title VII claim on plaintiff's behalf.

(46)

administrative "grade appeals" within Langston which were ultimately denied February 5, 1996. Plaintiff was dismissed from the nursing program.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. §1681(a). Most courts have taken the Title VII employment discrimination proof scheme and applied it to Title IX gender discrimination cases. See Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir.), cert. denied, 510 U.S. 1004 (1993); Preston v. Virginia ex rel. New River Comm. College, 31 F.3d 203, 207 (4th Cir.1994).

The plaintiff has presented no direct evidence the defendants' decisions were motivated by his gender. A Title VII plaintiff may

establish a prima facie case under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), by demonstrating that (1) he belongs to a protected class; (2) he was qualified and satisfactorily performing his job; and (3) he was terminated under circumstances giving rise to an inference of discrimination. Martin v. Nannie & the Newborns, 3 F.3d 1410, 1417 (10th Cir.1993).

Plaintiff's establishment of a prima facie case gives rise to a presumption that defendant unlawfully discriminated. See Greene v. Safeway Stores, Inc., 98 F.3d 554, 558 (10th Cir.1996) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993)). The burden then shifts to defendant to rebut the presumption of discrimination by "articulat[ing] a facially nondiscriminatory reason for the adverse employment decision." Marx v. Schnuck Mkts., Inc., 76 F.3d 324, 327 (10th Cir.1996)(citation omitted). If defendant succeeds in doing so, to avoid summary judgment, plaintiff must then "show that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual--i.e., unworthy of belief." Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir.1995), cert. denied, 116 S.Ct. 2552 (1996). For summary judgment purposes, a plaintiff makes an adequate showing of pretext by demonstrating "that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Marx, 76 F.3d at 327-28 (internal quotations omitted).

In applying this scheme in the context of a student dismissed

for academic reasons, the Court bears in mind the great deference accorded to university instructors in evaluating a student's performance. See Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 225 & n.11 (1985); Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 87-91 (1978). While it might be said that plaintiff has failed to establish that he was qualified to continue in the nursing program in view of his D grade in the Nursing Process II course, plaintiff alleges that the grade itself was the result of discriminatory treatment. Therefore, the Court concludes plaintiff has established a prima facie case.

However, plaintiff's academic performance provides a legitimate nondiscriminatory explanation for the defendants' actions. The burden thus shifts to plaintiff to establish pretext. Plaintiff does not dispute that the tests given in the course were of the objective, multiple choice type, but he asserts that certain quizzes given in the course contained fill-in-the-blank or essay questions. However, plaintiff has made no showing of the weight given in course grading between tests and quizzes, what his scores were on tests as opposed to quizzes, or how his "quiz" scores compared to female students who gave similar answers. His bald assertion that non-objective questions permitted a greater opportunity for instructor discrimination against him is insufficient to show pretext.

Plaintiff also contends, and the contention finds support in the instructors' depositions, that certain questions on the tests were "thrown out" in the grading process. Although the reason is

not perfectly clear, it appears that the instructor concluded that a certain question was too difficult, in view of the fact that many students answered incorrectly. The primary instructor states that, in this process, "I never lowered a student's score". (Affidavit of Kathleen Clarke at ¶4). Plaintiff asserts that "many of the test questions that were thrown out Plaintiff had answered correctly, but he did not receive credit". (Plaintiff's Brief at 5). The same assertion is made in ¶12 of plaintiff's affidavit. However, he provides no means by which the Court can determine that this assertion is based on personal knowledge, as required by Rule 56(e) F.R.Cv.P. The opposing party must demonstrate some affirmative indication that his version of relevant facts has some basis. Conaway v. Smith, 853 F.2d 789, 794 (10th Cir.1988).

Finally, plaintiff contends that on numerous occasions, Langston nursing students have been given grades of "incomplete" in a course they were failing, and were allowed to remediate the failing grade and continue in the nursing school. This is described in plaintiff's brief as an accepted university practice for "favored" students. Plaintiff's evidence on the point is lacking.

One affiant who describes being given an "incomplete" in a course to avoid a grade of D is Bill Jackman, another male nursing student. The affidavit of Deborah Guy states that she has "personal knowledge" of nine students given "special favors and consideration in Nursing Process II" through being given a grade of incomplete. An affiant cannot render her assertions appropriate

under Rule 56(e) by simply prefacing them with the statement "I have personal knowledge that. . . ." As already stated, some basis must be set forth. Information obtained through hearsay does not constitute "personal knowledge". Moreover, affiant Guy does not state how many of these nine students were women, which would be the relevant information under Title IX.

The affidavit of Anita Leforce indicates that she was permitted such an opportunity in the course Nursing Practicum I by instructor Gayle Pinkosky. This is neither the course nor the instructor relevant to plaintiff. The probative value of the affidavit is negligible. Two pages of the deposition of Carolyn Turner Kornegay, the Dean of Nursing at Langston, refers to some unnamed instructor who gave a group of students in an unnamed course incomplete grades to enable the students to "develop the clinical skills that they needed." (Kornegay deposition at 163). These pages have been provided to the Court without the contextual pages; as they stand, they fall short of demonstrating pretext for gender discrimination in the treatment of plaintiff and the grade received.[2] Upon review, the Court concludes summary judgment is appropriate as to plaintiff's Title IX claim.[3]

The Court now turns to plaintiff's claim under 42 U.S.C.

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[2]Assuming that Kornegay was referring to instructor Gayle Pinkosky, Pinkosky's affidavit establishes that no student to whom she granted an "incomplete" was failing the course.

[3]Plaintiff has also presented various statements in affidavits that certain Langston instructors or administrative personnel "didn't like" plaintiff. Without a showing of nexus to plaintiff's gender, such evidence is not probative in this Title IX action.

§1983.[4] One aspect of plaintiff's claim is gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. As with Title IX, courts have used Title VII principles to assess a §1983 claim of gender discrimination. See Wallace v. Texas Tech Univ., 80 F.3d 1042, 1047 (5th Cir.1996). For the same reasons that plaintiff has failed to establish pretext under Title IX, the Court also concludes that plaintiff has not established an Equal Protection claim through §1983.

Next, plaintiff asserts a violation of his procedural due process rights in connection with dismissal from the nursing program. The procedural protections of the Due Process Clause apply when the government has deprived an individual of an interest in liberty or property. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Graduate students at public institutions have a protected property interest in their continued enrollment. Harris v. Blake, 798 F.2d 419, 422 (10th Cir.1986); Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir.1975).

However, the Supreme Court has drawn a distinction between dismissals for disciplinary and academic reasons. While a dismissal for disciplinary reasons requires the giving of effective notice and an informal hearing, these requirements do not apply to a dismissal for academic reasons. Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 88-89 (1978). The Supreme

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[4]Although defendant has not raised the argument, the Court notes that the Tenth Circuit has rejected the view that a §1983 claim is precluded by a concurrent Title IX claim, so long as the 1983 action is not predicated on a violation of Title IX itself. Seamons v. Snow, 84 F.3d 1226, 1233-34 & n.8 (10th Cir.1996).

Court noted that a dismissal for academic reasons:

> is by its nature more subjective and evaluative than the typical questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Id. at 90. "Dismissal of a student for academic reasons comports with the requirements of procedural due process if the student had prior notice of faculty dissatisfaction with his or her performance and of the possibility of dismissal, and if the decision to dismiss the student was careful and deliberate." Schuler v. Univ. of Minn., 788 F.2d 510, 514 (8th Cir.1986), cert. denied, 479 U.S. 1056 (1987). The record reflects that this standard was met in this case, and plaintiff's procedural due process claim fails.[5]

Plaintiff also appears to assert a substantive due process claim. "The Due Process Clause not only provides a procedural safeguard against deprivations of life, liberty and property but also protects substantive aspects of those interests from

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[5]The parties dispute whether plaintiff received "formal, written" notice of unsatisfactory progress, but such is unnecessary. It is clear that instructor Kathleen Clarke met with plaintiff numerous times about his grades in Nursing Process II and informed him of unsatisfactory progress. (Clarke affidavit at ¶6.) Likewise, the Court need not resolve the parties' dispute as to whether page 46 of the Student Handbook, describing counseling procedures, applies only to disciplinary problems, as defendant contends. The fact that the page is headed "Student Disciplinary Counseling Procedure" lends weight to defendant's argument, but in any event the record establishes that the defendants complied with the constitutional standard in this case. Plaintiff has not asserted a breach of contract action regarding the handbook.

unconstitutional restrictions by government." Harris, 798 F.2d at 424. "To state a substantive due process claim a plaintiff must show that the government's deprivation of a property interest was arbitrary or not reasonably related to a legitimate governmental interest." Williams v. Texas Tech Univ. Health Sciences Ctr., 6 F.3d 290, 294 (5th Cir.1993). Again, the Court is mindful of the Supreme Court's admonition that:

> [w]hen judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (footnote omitted). Plaintiff has failed to demonstrate that the university's actions here were arbitrary or capricious under the standard defined above.

It is the Order of the Court that the motion of the defendant for summary judgment (#24) is hereby GRANTED.

ORDERED this 7 day of April, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation,

Plaintiff,

vs.

CYRIL PETROCHEMICAL CORPORATION, an Oklahoma corporation, and OKLAHOMA ENERGY CORPORATION, an Oklahoma corporation, formerly known as CAYMAN RESOURCES CORPORATION,

Defendants.

Case No. 97-CV-785-B(M)

DEFAULT JUDGMENT

The Motion of Plaintiff The Burlington Northern and Santa Fe Railway Company for default judgment against Defendants Cyril Petrochemical Corporation and Oklahoma Energy Corporation, comes on for consideration on this 7th day of ~~March~~ April, 1998. From a review of the combination motion and supporting brief and a review of the Court file in this case, this Court finds that: The Complaint herein was filed on August 27, 1997; the Summons and the Complaint were duly served upon the Defendants — and each of them — on September 4, 1997; the answer date or response date expired and was not extended; neither Defendant has filed an Answer or other response to the Complaint, and both are in default; the Clerk of this Court has heretofore entered the default of the Defendants, and each of them; Defendants, and each of them, are deemed to have admitted the material allegations of the Complaint; and the Affidavit testimony of Mr. Tom Gergen of Plaintiff The Burlington Northern and Santa Fe Railway Company and Robert J. Campbell, Jr., Esq., establish that

Defendants — and each of them — are indebted to Plaintiff in the sum of Forty-Eight Thousand, Five Hundred Thirty-Five Dollars and Thirty-Three Cents ($48,535.33), with the further sum of Eight Thousand, Twenty-Six Dollars and Sixty-Nine Cents ($8,026.69) in pre-judgment interest.

Accordingly, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff have judgment against Defendants Cyril Petrochemical Corporation and Oklahoma Energy Corporation in the sum of Fifty-Six Thousand, Five Hundred Sixty-Two Dollars and Two Cents ($56,562.02), together with post-judgment interest at the rate of 5.39% [redacted] and costs to be assessed by the Clerk upon the filing of a Bill of Costs.

IT IS SO ORDERED.

DATED: April 2, 2018

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:

Robert J. Campbell, Jr., OBA #1451
Michael R. Perri, OBA #11954
RAINEY, ROSS, RICE & BINNS
735 First National Center West
Oklahoma City, Oklahoma 73102
(405) 235-1356 (telephone)
(405) 235-2340 (facsimile)

ATTORNEYS FOR PLAINTIFF
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

\\0020\wp_docs\Special Clients\9297-92 Cyril Petro\Pleadings\DefaultJudgment

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

REGINA L. BALTON,
SSN: 512-68-8137

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

No. 97-C-615-J

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 7 day of April 1998.

Sam A. Joyner
United States Magistrate Judge

(12)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHAWN E. DANIEL	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. : 97-CV-283-BU
	)	
BLACK & DECKER (U.S.), INC.	)	
	)	
Defendant.	)	

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Shawn Daniel, through his attorneys of record, Greg Haubrich and Carol E. Keeter, joining with the Defendant, Black & Decker (U.S.), Inc., through its attorneys of record, Robert D. Tomlinson and Joel H. McNatt, and submit the following stipulation of dismissal with prejudice to the Court.

It is stipulated and agreed by and between the parties that the above-captioned cause is dismissed with prejudice as to the refiling of any future actions thereon.

GREG HAUBRICH, OBA # 11854
CAROL E. KEETER, OBA # 15491
Suite 200W, One North Hudson
Oklahoma City, Oklahoma 73102
Telephone: (405) 239-6700
Fax: (405) 239-6746

ATTORNEYS FOR PLAINTIFF

ROBERT D. TOMLINSON
JOEL H. McNATT
101 North Broadway, Suite 800
Oklahoma City, Oklahoma 73102-8493
Telephone: (405) 239-6444
Fax: (405)239-7902
ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 4-8-98

MELVIN GREEN,

Plaintiff,

v.

HARSCO CORPORATION, a Delaware corporation; and FABSCO, INC., an Oklahoma corporation,

Defendant.

Case No. 97-C-647-H

FILED

APR 7 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on reconsideration of Plaintiff's motion to remand (Docket # 4). Plaintiff originally brought this action in the District Court of Creek County. Plaintiff's original Petition contained four counts -- three based upon state law and one alleging a federal cause of action. Plaintiff has amended his Petition to abandon the federal cause of action. Therefore, Plaintiff alleges that Defendant has violated Oklahoma law by discharging Plaintiff from its employ in contravention of Okla. Stat. tit. 85, § 5; that Defendant's outrageous conduct constitutes intentional infliction of emotional distress; and that, Plaintiff was discharged in violation of public policy under Oklahoma law. For each of Counts I, II, and III, Plaintiff sought in excess of $10,000[1] damages.

In his motion to remand, Plaintiff stated that he intended to abandon his federal cause of action with the result that "federal jurisdiction will be destroyed." Pl. Mot. to Remand at 2, ¶ 9. The Court rejected Plaintiff's contention that such an amendment would divest this Court of

---

[1]In Oklahoma, the general rules of pleading require that:

> [e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars ($10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars ($10,000), except in actions sounding in contract.

Okla. Stat. tit. 12, § 2008(2).

subject matter over Plaintiff's state law claims pursuant to 28 U.S.C. § 1441(c). See In Re Carter, 618 F.2d 1093, 1101 (5th Cir. 1980).

Upon review of the amended complaint, the Court has decided to reconsider Plaintiff's motion to remand. To the extent that Plaintiff's motion to remand was based upon a theory that his amendment deprived the Court of subject matter jurisdiction, the Court concludes Plaintiff's motion should be denied. However, to the extent that Plaintiff's motion to remand seeks remand based upon the Court's discretion, the Court finds that principles of economy, convenience, fairness, and comity compel the Court to decline to hear Plaintiff's remaining claims. Plaintiff's claims sound entirely in state law and are best determined by a state tribunal. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 357 (1988). For these reasons, this action is hereby remanded to the District Court of Creek County.

IT IS SO ORDERED.

This 7th day of April, 1998.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 97CV1137B(M)**
	)	
OPIE R. CUMMINGS,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 2 day of April, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Opie R. Cummings, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Opie R. Cummings, was served with Summons and Complaint on February 19, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Opie R. Cummings, for the principal amount of $5,255.33, plus accrued interest of $2,433.13, plus administrative charges in the amount of $5.00, plus interest thereafter at the rate of 8 percent per annum

until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.34% percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/llf

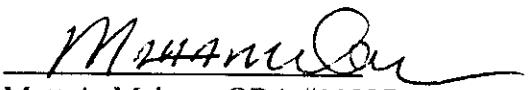
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Paul E. Ellis,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 97-CV-1050B**
	)	
David W. O'Neal, Brookhaven Hospital, Inc., Dr. Ashok Kache, M.D., Dr. Ashok Kache, M.D., Inc., and NRI, Inc.	)	
	)	**JURY TRIAL DEMANDED**
Defendants.	)	**ATTORNEY'S LIEN CLAIMED**

DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Paul E. Ellis, and hereby dismisses without prejudice the above styled and numbered lawsuit against all of the above-named Defendants. This dismissal is filed without prejudice to refiling within one year, as provided by law.

MELONE & MELONE



Matt A. Melone, OBA #11927
1718 South Cheyenne
Tulsa, Ok. 74119
(918) 587-3366

CV

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AT&T WIRELESS SERVICES OF TULSA, INC., a Nevada corporation, and AT&T CORP., a New York corporation,

Plaintiffs,

vs.

CELLULAR SOLUTIONS, INC., an Oklahoma corporation,

Defendant,

No. 98-CV-0005H (J)

NOTICE OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiffs AT&T Wireless Services of Tulsa, Inc. and AT&T Corp. hereby dismiss this action with prejudice to the refiling thereof.

Dated this 6th day of April, 1998.

Scott R. Rowland (OBA #11498)
Boone, Smith, Davis, Hurst
& Dickman
500 ONEOK Plaza
100 West 5th Street
Tulsa, OK 74103
(918) 587-0000

Attorneys for Plaintiffs AT&T Wireless Services of Tulsa, Inc. and AT&T Corp.

(7)

Certificate of Service

The undersigned hereby certifies that on the 6th day of April, 1998, a true and correct copy of the foregoing Notice of Dismissal With Prejudice was mailed, postage prepaid, to:

Donald L. Kahl
Hall, Estill, Hardwick, Gable, Golden and Nelson
320 South Boston, Suite 400
Tulsa, OK 74130

Attorney for Defendant
Cellular Solutions, Inc.

Scott R. Rowland

275-7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DALE JEAN TERWILLIGER, on behalf of herself and all other employees of HOME OF HOME, INC. similarly situated,

Plaintiffs,

v.

HOME OF HOPE, INC.,

Defendant.

FILED
APR 6 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96CV1042H

ENTERED ON DOCKET
DATE APR 07 1998

JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COME NOW Plaintiffs and Defendant, each and all, and, pursuant to Fed. R. Civ. Proc. 41(a)(1), hereby stipulate to the voluntary dismissal of the above-referenced action by Plaintiffs:

1. Susan Abrams;
2. Howard Abrams;
3. Barry Mason;
4. Imogene Williamson;
5. Misty Zanger,

without prejudice.

DATED this 6 day of April, 1998.

(67)

Respectfully submitted,

BEST, SHARP, HOLDEN, BEST, SULLIVAN & KEMPFERT

Steven E. Holden, OBA #4289
Terry S. O'Donnell, OBA #13110
100 W. 5th St., Suite 808
Tulsa, OK 74103-4225
(918) 582-1234
Facsimile: (918) 585-9447

ATTORNEYS FOR DEFENDANT

Gerald R. Lee, OBA #5335
117 South Adair
P.O. Box 1101
Pryor, OK 74362
(918) 825-2233
Facsimile: (918) 825-6613

ATTORNEY FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SUSAN ADAMS,

Plaintiff,

v.

AMERICAN AIRLINES, INC.,

Defendant.

Case No. 94-C-1046-H

JUDGMENT

This matter came before the Court for a trial by jury on March 30-April 3, 1998. On April 3, 1998, the jury returned its verdict, finding that Plaintiff Susan Adams had not proved by a preponderance of the evidence that she was drug tested more frequently than other similarly situated employees while she was in the follow-up testing program. Thus, Plaintiff has failed to prove an essential element of her retaliation claim.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant and against Plaintiff.

IT IS SO ORDERED.

This 3rd day of April, 1998.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 6 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES SLUSSER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 97-CV-770 H (M)**
	)	
JAMES HINKLE,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE APR 07 1998

JUDGMENT

This matter comes before the Court April 6TH, 1998, pursuant to a settlement reached by the parties through participation in a Settlement Conference conducted March 25, 1998, Honorable Sam A. Joyner, U.S. Magistrate Judge, facilitating. The Plaintiff, James Slusser ("**Slusser**"), is represented by his legal counsel, Robert S. Glass of Johnson, Allen, Jones & Dornblaser and the Defendant, James Hinkle ("**Hinkle**"), is represented by his legal counsel, Kelly F. Monaghan of Holloway & Monaghan. The parties have represented to the Court by virtue of their signatures set forth below that they have agreed to the entry of this Judgment by confession.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court, and the Court adopts as its FINDINGS, as well, the following stipulations and agreement of the parties to this Judgment:

1. This Court has jurisdiction over the subject matter and both of the parties hereto. The issues in this case have been resolved either by agreement between the parties or reservation for future determination by the Court, as set forth in this Judgment.

(22)

2. Slusser is awarded judgment against Hinkle in the sum of $73,321.35, representing the unpaid indebtedness under the "Guaranty Agreement", "Note" and related loan documents described in Slusser's Second Amended Complaint filed herein. The indebtedness is comprised of $42,808.35 in principal, $17,458.56 in interest (thru March 31, 1998) and $13,054.44 in bank overdraft advances.

3. In addition to the money judgment awarded Slusser in the preceding paragraph, Slusser shall be entitled to recover from Hinkle reasonable attorneys fees, the amount of which is hereby reserved for future determination by the Court, pending application to be made by Slusser. Such application may be filed no earlier than the date upon which execution upon the Judgment may occur pursuant to Paragraph 4 below and no later than 6 months after such date. Nothing contained in this Judgment shall be treated as a waiver of any defenses Hinkle may be entitled to assert relevant to the Court's future determination of an award of attorneys fees in favor of Slusser.

4. Slusser has agreed that he shall be precluded from executing upon this Judgment until June 24, 1998. If Hinkle (i) delivers to Slusser (by delivery to the offices of Slusser's legal counsel) a sworn and witnessed financial statement, scheduling in financial institution form all of his assets and liabilities as of the date the financial statement is submitted to Slusser, and (ii) the financial statement reflects that Hinkle's representation to Slusser during the Settlement Conference that Hinkle has no non-exempt assets upon which Judgment execution would attach (excluding future wages) was and continues to be a truthful representation, then and only in these events shall Slusser be precluded from executing on the Judgment until September 21, 1998.

5. Hinkle shall receive the benefit of any payments Slusser receives from American Direct Mail Partners, Inc. which reduces the total indebtedness due to Slusser from Hinkle under this Judgment.

6. Hinkle hereby transfers, assigns and relinquishes to Slusser all right, title and interest of every nature he may have, or be entitled to assert, with respect to the ownership of capital stock in American Partners, Inc., American Direct Mail Partners, Inc. and American Mail Processing Services, Inc. In consideration of the transfer, assignment and relinquishment of stock rights by Hinkle in favor of Slusser, Slusser hereby releases, relinquishes, forgives and cancels all obligations of Hinkle to Slusser under that certain Promissory Note dated December 15, 1995, in the original principal sum of $20,000.

7. With the exception only of the issues reserved for future determination by the Court in paragraph 3 of the Judgment, all other claims asserted and assertable between Slusser and Hinkle arising under the Guaranty, Note and Loan Documents are compromised and settled with the entry of this Judgment.

8. Interest shall accrue on all of the indebtedness of this Judgment until paid in full at the stated rate of interest per annum set forth in the Note until paid to Slusser in full.

9. Upon the signing of this Judgment by Slusser and Hinkle, Hinkle shall pay to Slusser $500 by delivery to Slusser's legal counsel.

10. Execution on this Judgment shall issue in favor of Slusser upon the earlier to occur of (i) a default in performance of any obligation or representation of Hinkle set forth in

this Judgment or (ii) upon expiration of the applicable covenant not to execute set forth in this Judgment.

IT IS SO ORDERED.

HON. SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:

Robert S. Glass, Attorney for Plaintiff

Kelly F. Monaghan, Attorney for Defendant

James Slusser

James Hinkle

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRELL LAMONTE SHAVER,)
)
Plaintiff,)
)
vs.) Case No. 98-CV-0010-K (J)
)
SGT. TOM FIKE,)
)
Defendant.)

ORDER

Plaintiff, appearing *pro se* and *in forma pauperis*, has filed this civil rights action pursuant to 42 U.S.C. § 1983 (Docket #1) naming Sgt. Tom Fike as Defendant. Plaintiff's complaint alleges that on or about November 27, 1997, he was made "trusty" [sic] by Defendant and was promised $25.00 for each day he worked. Plaintiff states that as of January 4, 1998, he has not "received any good time or $25.00 per day for the time" he has worked and believes that he "should be receiving the $25.00 dollars per day for each day I've worked and should continued (sic) to receive trusty (sic) status based on the fact that I was appointed trusty (sic) by the defendant (Sgt. Tom Fike) who is, currently, when on duty in charge of the 8th and 9th floor of the Tulsa County Jail, under the direction of the Tulsa Co. Sheriff Stanley Glantz (sic)."

The Prison Litigation Reform Act ("PLRA") amended section 1997e of the Civil Rights of Institutionalized Persons Act of 1980 (42 U.S.C. §§ 1997-1997j), initiating several significant changes in the management of prison litigation. Section 1997e bars a suit brought by a prisoner with respect

(5)

to prison conditions[1] under § 1983, or any other Federal law, until such administrative remedies as are available are exhausted. See 42 U.S.C. § 1997e(a).[2] Thus, if a prisoner has not exhausted all available administrative remedies, the Court must dismiss the complaint for lack of subject matter jurisdiction.

In this case, Plaintiff does not indicate that he has exhausted available administrative remedies, nor does it appear from the face of the complaint that he has pursued any administrative remedies. However, as discussed supra, Plaintiff must exhaust all levels of the administrative scheme before seeking relief in this Court. After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), the Court concludes that Plaintiff's action should be dismissed for failure to exhaust administrative remedies.

Notwithstanding the above, pursuant to 42 U.S.C. § 1997e(c)(1), a court shall dismiss "any action brought with respect to prison conditions under section 1983 . . ., or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." In fact, should the court

---

[1]A definition of "prison conditions" is found at 18 U.S.C. § 3626g(2) (part of the PLRA):

> (2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison.

[2]Section 1997e(a) provides:

> (a) No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

determine a § 1983 claim falls within section 1997e(c)(1), the action may be dismissed without requiring the exhaustion of administrative remedies. See 42 U.S.C. § 1997e(c)(2).

A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S.Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

For a complaint under section 1983 to be sufficient, a plaintiff must allege two prima facie elements: (1) that defendant deprived him of a right secured by the Constitution and laws of the United States, and (2) that defendant acted under color of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). The Supreme Court has traditionally held that a prisoner's classification does not implicate a constitutional right of Plaintiff. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Further, changing an inmate's prison classification ordinarily does not deprive him of liberty, because he is not entitled to a particular degree of liberty in prison. See Meachum, 427 U.S. at 225. Thus, any expectation Plaintiff may have had in remaining a "trusty" (sic) at the Tulsa City/County Jail or at any other medium security facility is insufficient to rise to the level of a due process violation. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991).

Additionally, federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to the broad discretion of prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Hewitt v. Helms, 459 U.S. 460, 467-68

(1983); Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983); Twyman, 584 F.2d at 356-57. Accordingly, Plaintiff's classification claim lacks an arguable basis in law and does not rise to the level of a constitutional violation. As a result, Plaintiff cannot establish the first prima facie element of a § 1983 claim.

Therefore, Plaintiff's complaint should be dismissed as frivolous since it is based "on an indisputably meritless legal theory." Neitzke, 490 U.S. at 327. Further, "when it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile," a court may dismiss the complaint *sua sponte*. Hall, 935 F.2d at 1110.

ACCORDINGLY, IT IS HEREBY ORDERED that this case is **dismissed with prejudice**.

SO ORDERED THIS 3 day of April, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

PATRICIA WISE aka Patricia Cain;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

APR 06 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 07 1998

CIVIL ACTION NO. 97-CV-635-K (W)

ORDER
VACATING JUDGMENT OF FORECLOSURE AND
ORDER OF SALE AND DISMISSING WITH PREJUDICE

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that the Judgment of Foreclosure filed on February 3, 1998, be, and the same is vacated, set aside and held for naught; it is further ORDERED that the Order of Sale issued on March 16, 1998, be, and the same is vacated, set aside and held for naught; it is further ORDERED that this action be, and the same is dismissed with prejudice.

Dated this 3 day of April, 1998.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

WDB:css

(11)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARKEL IRVIN JUNG,)
)
Plaintiff,)
)
vs.)
)
DEPARTMENT OF CORRECTIONS,)
STATE OF OKLAHOMA,)
and JAMES SAFFLE, Director,)
)
Defendants.)

No. 98-CV-0151-K (J)

ORDER

Plaintiff, a state prisoner currently incarcerated at the Oklahoma State Penitentiary, McAlester, Oklahoma, has submitted a motion for leave to proceed *in forma pauperis* under 28 U.S.C. § 1915, as amended by The Prison Litigation Reform Act, and a 42 U.S.C. § 1983 civil rights complaint. In his complaint, Plaintiff alleges that his due process rights were violated when his classification was changed, resulting in the loss of 115 earned credits and transfer to a maximum security facility. Plaintiff requests "$75,000 in punitive damages (i.e., loss of property)," damages for mental suffering and that he be returned to medium security prison. (Docket #1).

Based upon review of the complaint and for the reasons set forth below, the Court finds that venue is not proper in this district and that this action should be dismissed without prejudice. See Costlow v. Weeks, 790 F.2d 1486 (12th Cir. 1986) (court has the authority to raise venue issue sua sponte).

The applicable venue provision for this action is found under 28 U.S.C. §1391(b) which provides as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district

(3)

where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

There is no applicable law with regard to venue under 42 U.S.C. §1983 which would exempt this case from the general provisions of 28 U.S.C. §1391(b). Coleman v. Crisp, 444 F. Supp. 31 (W.D. Okla. 1977); D'Amico v Treat, 379 F. Supp. 1004 (N.D. Ill. 1974).

In this case, Plaintiff sues the State of Oklahoma, Department of Corrections (DOC), and James Saffle, Director, DOC. Although the body of the complaint also names "Danny Johnson" of Cleveland County, Oklahoma, as a defendant, Mr. Johnson is not named in the caption. Nevertheless, according to the complaint, each named Defendant resides in either the Eastern or the Western Districts of Oklahoma. See 28 U.S.C. § 116. Furthermore, none of the events giving rise to Plaintiff's claims occurred in this judicial district. Thus, it is clear that venue is not proper before this Court[1] and Plaintiff's complaint should be dismissed without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed *in forma pauperis* (doc. #2) is **denied** and that this action is **dismissed without prejudice** for improper venue. 28 U.S.C. § 1406(a).

SO ORDERED THIS 3 day of April, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

[1]The Court notes that the caption of Plaintiff's complaint reads "UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA." Although Plaintiff mailed his complaint to this Court, the U.S. District Court for the Northern District of Oklahoma, it may have been Plaintiff's intention to file this lawsuit in the U.S. District Court for the Eastern District of Oklahoma.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHERRI R. COPELAND,)
)
Plaintiff,)
)
vs.) Case No. 97-CV-159-B
)
SPECIALIZED HOME NURSING, INC.,)

JUDGMENT

This action came on for jury trial before the Court, Honorable Thomas R. Brett , District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered by the jury,

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff, Sherri R. Copeland, take nothing, that the action be dismissed on the merits, and that the Defendant recover of the Plaintiff its costs of action. Each party is to pay their own attorney fees.

DATED this 3rd day of April, 1998.

THE HONORABLETHOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

40

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MELVIN E. EASILEY aka Melvin Easiley
aka Melvin Eugene Easiley;
DENISE L. EASILEY;
CITY OF GLENPOOL, Oklahoma;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma;
LISA EASILEY, Current Spouse of Melvin E. Easiley;
DONALD J. BAHNMAIER,

Defendants.

CIVIL ACTION NO. 95-C-437-B

JUDGMENT

This matter came on for trial before the Court on March 3, 1998 with Loretta F. Radford representing Plaintiff, United States of America; Eric B. Bolusky representing the Defendants, Melvin E. Easiley aka Melvin Easiley aka Melvin Eugene Easiley and Lisa Easiley; and Defendant, Donald J. Bahnmaier appeared pro se.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1345 and venue is proper pursuant to 28 U.S.C. Section 1391.

After trial and due consideration, the Court issued written Findings of Fact and Conclusions of Law filed on March 20, 1998. Subsequently, the Court issued Amended Findings of Fact and Conclusions of Law filed on April 1, 1998; wherein the Court made the following findings and conclusions:

1. The United States of America on behalf of its agency, the United States Department of Housing and Urban Development ("HUD") (hereinafter collectively "the United

States") is the plaintiff in this case. The real property which is the subject of this action is located within the jurisdictional confines of the Northern District of Oklahoma.

2. This is a civil action for an in rem judgment and foreclosure of a mortgage on the following described real property located within the Northern Judicial District of Oklahoma:

> LOT TWENTY-EIGHT (28), BLOCK NINE (9), OF "LOTS 1-7 OF BLOCK 2, LOTS 6-20 OF BLOCK 3, LOTS 4-19 OF BLOCK 4, LOTS 6-20 OF BLOCK 5, AND ALL BLOCKS 6 THROUGH 19 KENDALWOOD IV ADDITION" TO THE CITY OF GLENPOOL, TULSA COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The real property is also known as 13621 South Oak Street, Glenpool, Oklahoma.

3. On September 30, 1987, Ernest R. Cuellar and Juanita Cuellar executed and delivered to Oak Tree Mortgage Corporation ("Oak Tree"), their mortgage note in the amount of $77,901.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum. As security for the payment of the above-described note, Ernest R. Cuellar and Juanita Cuellar, husband and wife, executed and delivered to Oak Tree, a real estate mortgage dated September 30, 1987, covering the real property. This mortgage was recorded on October 2, 1987, in Book 5055, Page 1895, in the records of Tulsa County, Oklahoma.

4. On July 1, 1989, Ernest R. and Juanita Cuellar, husband and wife, executed a General Warranty Deed to Melvin E. and Denise L. Easiley, husband and wife. The General Warranty Deed was recorded with the Tulsa County Clerk on July 5, 1989, in Book 5192, Page 2243. The General Warranty Deed provided in part:

> Parties of the Second Part agree to assume and pay existing Mortgage to Oak Tree Mortgage and/or assigns "Subject, however to a first mortgage in favor of Oak Tree Mortgage Corporation."

Thus, pursuant to the General Warranty Deed, defendants Melvin E. Easiley and Denise L. Easiley became joint obligors and assumptors on the original note and mortgage in favor of Oak Tree.

5. The defendant Melvin E. Easiley (hereinafter "Melvin Easiley") is also known as Melvin Easiley and Melvin Eugene Easiley.

6. Defendant Melvin Easiley separated from his wife Denise L. Easiley and moved out of the real property in January 1990.

7. Melvin and Denise L. Easiley were in default of the above described mortgage note and mortgage in September 1990 when they stopped making monthly payments.

8. On February 28, 1991, Melvin Easiley filed a Petition for Divorce against Denise L. Easiley in the District Court in and for Tulsa County Oklahoma, Case No. FD 91-01212.

9. On March 26, 1991, Oak Tree filed a petition to foreclose on said real property against Melvin E. and Denise L. Easiley and Ernest R. and Juanita Cuellar in the District Court in and for Tulsa County Oklahoma, Case No. CJ 91-1404 for failure to pay monthly installments on the above described mortgage note and mortgage since September 1990.

10. On April 15, 1991, Ernest R. Cuellar and Juanita Cuellar filed a disclaimer in Case No. CJ-91-1404, stating that they "disclaim any and all right, title or interest in the" real property.

11. On August 5, 1991, Melvin Easiley, through his counsel Caesar C. Latimer, filed an answer in the foreclosure action asserting that Oak Tree had no right to

foreclose on the real property "for the reason that an extension of time for payment has been granted to pay and reduce the amount of said mortgage."

12. On July 26, 1991, Oak Tree dismissed its foreclosure action, Case No. CJ-91-1404 without prejudice and assigned the above described mortgage note and mortgage to the United States Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 29, 1991, in Book 5338, Page 415, in the records of Tulsa County, Oklahoma.

13. On July 23, 1991, Denise L. Easiley entered into an agreement with HUD reducing the amount of the monthly installments due under the mortgage note in exchange for HUD's forbearance of its right to foreclose on the real property. This agreement was purportedly signed by both Melvin and Denise Easiley. However, Melvin Easiley's signature was forged. Therefore, only Denise L. Easiley was a party to the agreement with HUD. Superseding agreements were reached between Denise L. Easiley and HUD in July 1992, July 1993 and July 1994.

14. On January 29, 1992, a Decree of Divorce was entered in Case No. FD 91-01212 divorcing Melvin Easiley from Denise L. Easiley, and by agreement of the parties, awarding the subject real property and assigning responsibility for the mortgage payments to Denise L. Easiley. The Decree of Divorce was formally filed on September 23, 1997.

15. The terms and condition of the mortgage note and mortgage described above, as well as the terms and conditions of the HUD forbearance agreements, have been

breached in that Defendant Denise L. Easily has failed to make monthly installments thereon although payment has been demanded.

16. As a result of the default on the mortgage note and mortgage as well as on the HUD forbearance agreements, the United States filed this foreclosure action on May 15, 1995. At the time of the filing of the foreclosure action, the United States was unaware that Denise L. Easiley had been awarded the subject real property as a term of the divorce decree and that Melvin Easiley had no right, title or interest in the real property.

17. On March 8, 1996 the Court Clerk entered default against Melvin E. Easiley, Denise L. Easiley and the City of Glenpool.

18. On March 15, 1996, this Court entered a Judgment of Foreclosure for the Untied States, finding that Defendants Melvin E. Easiley, Denise L. Easiley and the City of Glenpool were in default and foreclosing any interest in the real property held by Defendants.

19. The real property was sold on August 5, 1996 pursuant to a Marshal's Sale and a Marshal's Deed was issued to the Defendant Donald J. Bahnmaier on November 8, 1996 for good and valuable consideration.

20. On September 4, 1997, Plaintiff United States filed a Motion with Memorandum Brief to Vacate Judgment of Foreclosure, to Vacate Sale, and to Permit Filing Second Amended Complaint on the basis that "Melvin Easiley has informed the Plaintiff, United States of America that he was not served with the foreclosure Complaint in this case." The United States moved to amend the Complaint so that proper service could be made upon Melvin Easiley; to show that Melvin E. Easiley is also known as Melvin Easiley and Melvin Eugene Easiley; and to add Lisa Easiley, the current spouse of Melvin E. Easiley, and

Donald J. Bahnmaier as defendants. This Court granted the motion, vacating Judgment of Foreclosure, vacating sale and permitting filing of second amended complaint by its Order of September 15, 1997. On October 3, 1997, the United States filed the Second Amended Complaint.

21. In his Answer to the Second Amended Complaint, Melvin Easiley admitted that the real property was conveyed to him and Denise L. Easiley by General Warranty Deed from Ernest R. and Juanita Cuellar but denied being a current assumptor of the subject indebtedness. Melvin and Lisa Easiley also filed counterclaims for fraud and breach of legal and equitable duty against the United States alleging the following: (1) there is no record in the Clerk's Office of Tulsa County indicating that Melvin Easiley is liable to the United States on any mortgage; (2) despite this, the United States without notice to Melvin Easiley falsely executed agreements exclusively with Defendant Denise L. Easiley and concealed such from him; (3) as a result of the United States' concealment and failure to provide him with notice of the foreclosure, the United States prevented him from keeping the real property out of foreclosure. Melvin and Lisa Easiley cross-claimed against Denise L. Easiley alleging that "[a]ny judgment rendered against Defendant, Melvin Easiley, concerning the mortgage to Oaktree [sic] Mortgage Corporation dated September 30, 1987, is recoverable from Denise L. Easiley by virtue of the divorce decree dated January 29, 1992, filed September 23, 1997." Melvin Easiley dismissed his cross-claim against Denise L. Easiley on March 3, 1998 during the trial on this matter.

22. At the time HUD executed the assignment program (payment reduction agreement) with Denise L. Easiley in July 1991, Melvin Easiley was no longer residing on the

premises. The United States concealed no material facts from Melvin Easiley nor did it defraud Melvin Easiley.

23. Under the terms of the mortgage note and mortgage, upon default in the payments due or breach of any of the conditions, HUD is entitled to declare the balance due and payable immediately, and pursuant thereto, HUD has elected to declare the balance due and payable. As of March 3, 1998, there was due and owing under the mortgage note and mortgage, after full credit for all payments made, the principal sum of $121,539.77, which includes penalty charges in the amount of $1,930.14, plus accrued interest in the amount of $12,569.38, plus interest accruing thereafter at the rate of ten percent per annum until judgment, plus interest thereafter at the legal rate until fully paid.

24. Defendant Lisa Easiley does not claim any right, title or interest in the real property and is named as a defendant solely by virtue of her status as the current spouse of Melvin Easiley.

25. The Defendant City of Glenpool has defaulted in this matter.

26. The Defendant Denise L. Easiley has defaulted in this matter.

27. The Defendant Tulsa County Board of Commissioners does not claim any right, title or interest in the real property.

28. The Defendant Tulsa County Treasurer claims $26.00 in unpaid personal property taxes as a lien on the real property.

29. The Defendant Donald J. Bahnmaier claims an interest in the real property by virtue of a Marshal's Deed, dated November 8, 1996, and recorded on November 19, 1996, in Book 5862, Page 1014, in the records of Tulsa County, Oklahoma. Donald J.

Bahnmaier also counterclaims against the United States for damages incurred as a result of vacating the sale of the real property to him.

30. The United States concedes the true and proper owner of the subject real property is Defendant Donald J. Bahnmaier.

31. The Defendant Melvin Easiley was erroneously offered, prior to trial, the equitable right of redemption and rejected that offer.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that as of January 29, 1992, Defendant Melvin Easiley ceased to have any equitable right of redemption to the real property. On said date, the real property was conveyed to Denise L. Easiley by minute order and a Final Decree of Divorce signed and dated by the Tulsa County District Court in Case No. FD 91-01212 and filed in the court records on September 23, 1997.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Melvin Easiley did not hold any right, title or interest in the real property when the Complaint was originally filed on May 15, 1995 or when the Second Amended Complaint was filed on October 3, 1997.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Melvin Easiley's interest in the real property is thus hereby foreclosed even if any equitable right of redemption in Defendant Melvin Easiley survived the conveyance of the real property to Denise L. Easiley in the Final Divorce Decree since Melvin Easiley rejected the exercise of such right.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant Donald J. Bahnmaier's counterclaim against the United States is denied, except insofar as Donald J. Bahnmaier's right, title and interest in the real property is hereby recognized.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there is no evidence that the United States committed any acts of fraud, concealment or deceit against Melvin Easiley and therefore judgment is granted in favor of the Plaintiff United States on Defendant Melvin Easiley's counterclaims.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the second foreclosure proceeding in this case was unneccessary as the first foreclosure commenced by the Amended Complaint filed August 15, 1995 was proper regardless of whether Melvin Easiley was properly served with summons. Denise L. Easiley was properly served with summons in reference to the first foreclosure on September 2, 1995. At that time Melvin Easiley had no right, title or interest in the subject real property because the divorce decree of January 29, 1992 vested title in said real property in Denise L. Easiley. Thus, service upon Melvin Easiley of the Amended Complaint in the first foreclosure proceeding was not required.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Court's Order of September 15, 1997 vacating the judgment of foreclosure and sale of the subject real property is hereby vacated and set aside.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all right, title and interest in said real property is vested in Defendant Donald J. Bahnmaier by virtue of the Marshal's Deed, dated November 8, 1996, and recorded on November 19, 1996, in Book 5862, Page 1014, in the records of Tulsa County, Oklahoma, nunc pro tunc.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that title in said real property is quieted in Donald J. Bahnmaier.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Tulsa County Treasurer has a lien on the subject real property in the amount of $26.00.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff United States and/or Defendant Donald J. Bahnmaier may make a timely application for an appropriate supersedeas bond in the event of an appeal of the Order and Judgment in this case.

DATED this 3rd day of April, 1998.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment
Case No. 95-C-437-B (Eastley)

LFR:css

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WALTER MARLIN BROWN,

Appellant,

vs.

WILLIAM J. ZAREK; and
COPPOLA, SANDRE & McCONVILLE, P.C.,

Appellees.

ENTERED ON DOCKET

DATE 4-6-98

Case No. 98-CV-98-H(J)

FILED

APR -3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Now before the Court are Appellees' motions to dismiss this bankruptcy appeal as untimely. [Doc. Nos. 2 and 4]. For the following reasons, the undersigned recommends that Appellees' motions to dismiss be **GRANTED**.

I. APPELLANT'S OBJECTION TO MAGISTRATE JURISDICTION

This bankruptcy appeal has been referred to the undersigned Magistrate Judge for all further proceedings consistent with the Federal Rules of Civil Procedure and 28 U.S.C. § 636. See Minute Order dated February 4, 1998. Appellant has objected to the undersigned magistrate judge hearing this matter. [Doc. No. 10]. Appellant argues that the undersigned cannot consider Appellees' motions to dismiss because Appellant has not consented to magistrate jurisdiction. Appellant's argument has no merit.

The undersigned is aware that there is not a consent to magistrate jurisdiction in this case. The undersigned has not, therefore, issued a dispositive order in this case. Rather, this undersigned has issued this Report and Recommendation, which is

subject to *de novo* review by the assigned district judge. Pursuant to the Rules and § 636, a magistrate is authorized to hold hearings and issue reports and recommendations in bankruptcy matters as long as the magistrate's decision is subject to *de novo* review by the assigned district judge. See Hall v. Vance, 887 F.2d 1041, 1045 (10th Cir. 1989); Virginia Beach Federal Savings & Loan Assoc. v. Wood, 901 F.2d 849, 850 (10th Cir. 1990); and Griego v. Padilla, 64 F.3d 580, 583 (10th Cir. 1995).

II. FACTUAL BACKGROUND

The following time line is relevant to Appellee's motion to dismiss:

1. 12/18/97 Order filed by Bankruptcy Judge Terrence L. Michael, dismissing Appellant's Chapter 12 bankruptcy.

2. 12/24/97 A copy of Judge Michael's Order is mailed to the parties by the Bankruptcy Noticing Center.

3. 12/29/97 Appellant alleges that he mailed his Notice of Appeal to the Bankruptcy Court.

4. 12/29/97 The ten day period provided by Fed. R. Bankr. P. 8002(a) to file a notice of appeal expires.

5. 12/31/97 Appellant's Notice of Appeal is received and filed by the Bankruptcy Court. Rule 8002(a)'s time period for filing a notice of appeal expires if the three additional days provided by Fed. R. Bankr. P. 9006(f) for items served by mail applies to Rule 8002(a).

III. RELEVANT FEDERAL RULES OF BANKRUPTCY PROCEDURE

The relevant portions of Fed. R. Bankr. P. 8002 are as follows:

> (a) Ten-day period
>
> The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from.

Fed. R. Bankr. P. 8002.

The relevant portions of Fed. R. Bankr. P. 9006 provide as follows

> (a) Computation
>
> In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.
>
> (f) Additional time after service by mail
>
> When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

Fed. R. Bank. P. 9006.

The relevant portion of Fed. R. Bankr. P. 9022 provides as follows:

> (a) Judgment or order of bankruptcy judge
>
> Immediately on the entry of a judgment or order the clerk shall serve a notice of the entry by mail in the manner provided by Rule 7005 on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. **Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.**

Fed. R. Bankr. P. 9022 (emphasis added).

IV. DISCUSSION

Judge Michael's Order was filed December 18, 1997. Ten days from December 18, 1997 was December 28, 1997, which is a Sunday. Pursuant to Fed. R. Bankr. P. 9006(a), the ten day period would automatically be extended to Monday, December 29, 1997. Because no notice of appeal was on file on December 29, 1997, Appellees argue that Appellant's appeal is untimely under Fed. R. Bankr. P. 8002(a). The undersigned agrees.

The Courts of Appeal are in relative agreement regarding the proper interpretation of Rule 8002(a)'s 10 day period.[1/] The time for filing a notice of appeal from the bankruptcy court to the district court is governed by Rule 8002(a). "The

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[1/] See In re Herwit, 970 F.2d 709, 710 (10th Cir. 1992); In re Arbuckle, 988 F.2d 29, 31-32 (5th Cir. 1983); In re Schimmels, 85 F.3d 416, 420 (9th Cir. 1996); In re Maurice, 69 F.3d 830, 832 (7th Cir. 1995); In re Dunlaney, 29 F.3d 516, 518 (9th Cir. 1994); and 9 Collier on Bankruptcy ¶ 9006.10 (1992).

notice of appeal shall be **filed** with the clerk of the bankruptcy court within 10 days of the date of the **entry** of the judgment, order, or decree appealed from." Id. (emphasis added). Whether Appellant received actual notice of the entry of Judge Michael's Order prior to the end of the appeal period is irrelevant. The period begins to run from the date of the Order's entry, not from the date of its service. Id. and Fed. R. Bankr. P. 9022.

Appellant cannot rely on the fact that he mailed his Notice of Appeal before the deadline expired. A notice of appeal is filed as of the date it is actually received by the court, not as of the date it is mailed. See cases cited in footnote 1. The bankruptcy court clerk did not receive and file Appellant's Notice of Appeal until the thirteenth day. In particular, see In re Herwit, 970 F.2d 709, 710 (10th Cir. 1992) (dismissing an appeal filed on the eleventh day).

Relying on Fed. R. Bankr. P. 9006(f), Appellant argues that the appropriate filing period in this case is thirteen days, rather than ten, because a copy of Judge Michael's Order was served on him by mail. The undersigned does not agree. The Courts of Appeal have uniformly held that by its own terms Rule 9006(f) applies when a time period begins to run after service. Rule 8002(a)'s ten day period begins to run upon the entry of the order, not its service. Since the appeal time starts from the entry of the order and not from the date of its service, the time for appeal is not enlarged by Rule 9006(f). See cases cited in footnote 1.

RECOMMENDATION

The undersigned recommends that Appellees' motions to dismiss be granted and this bankruptcy appeal be dismissed. Appellant's appeal is untimely because a notice of appeal was not filed within 10 days as required by Fed. R. Bankr. P. 8002(a).

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the mater to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 3 day of March 1998.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

NTC OF AMERICA, INC.,

Debtor.

NTC OF AMERICA, INC.

Appellant,

vs.

EMPIRE FIRE & MARINE INSURANCE COMPANY and WESTPHALEN, BRADLEY & JAMES, INC.

Appellee.

Case No. 97-CV-0819-H (E)

PROPOSED FINDINGS AND RECOMMENDATIONS REGARDING MOTION TO DISMISS

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned for proposed findings and recommendations. Appellant NTC of America, Inc. ("NTC") appeals the order and judgment of the Bankruptcy Court, Mickey D. Wilson, J., filed May 29, 1997 and docketed June 2, 1997. Defendants/Appellees Empire Fire & Marine Insurance Company ("Empire") and Westphalen, Bradley & James ("Westphalen"), by a Joint Motion to Dismiss Appeal (Docket #2), challenge this Court's jurisdiction to hear the appeal. Having

reviewed the pleadings, and for the reasons discussed below, the undersigned **RECOMMENDS** that the Joint Motion to Dismiss Appeal be **DENIED**.[1]

I. Facts

NTC filed a voluntary petition for bankruptcy under Chapter 11 on March 1, 1990. NTC filed a complaint commencing an adversary proceeding against Empire and Westphalen on August 14, 1991. The Empire adversary proceeding eventually sought to resolve questions regarding (1) the priority of certain security interests under 11 U.S.C. § 547, (2) the avoidance of a possible preferential transfer under 11 U.S.C. § 547, and (3) the avoidance of a possible impermissible setoff under 11 U.S.C. § 553.

The focus of the Empire adversary proceeding was a transfer of $342,716 from Empire to Westphalen. Empire, which owed NTC $342,716, instead of directly paying NTC, paid that amount to Westphalen in partial satisfaction of debts owed by NTC to Westphalen. Naturally, if this transfer was valid, NTC and, consequently, NTC's other creditors would not recover as much as if the transfer was held invalid. Trial of the Empire adversary proceeding was concluded in August, 1992.

On January 2, 1996, the Bankruptcy Court entered an "Order Confirming Debtor's Liquidating Plan of Reorganization," which acknowledged the appointment of John H. Williams, Jr. as the Plan Trustee. The plan provided that, "the Plan Trustee shall be the proper party in interest to appear and litigate all matters to which the Debtor (as debtor-in-possession or otherwise) would

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[1] Pursuant to 28 U.S.C. § 636(b)(1)(B), the undersigned has been designated to submit proposed findings and recommendations for the disposition of matters relating to this appeal. After these proposed findings and recommendations are submitted, the parties will have an opportunity to object and the District Court may either accept, reject, or modify, in whole or in part, the undersigned's findings or recommendations. As the issue of jurisdiction raised by defendants/appellees presents an important threshold question, in the interests of judicial economy it should be resolved before a merits recommendation.

have been the proper party in interest prior to the Effective Date." Plaintiff's Response Brief at 7. Thereafter, on May 29, 1997, almost five years after the conclusion of the trial, the Bankruptcy Court entered an order and judgment in the Empire adversary proceeding. The Bankruptcy Court rejected the challenge to the Empire transfer and held that NTC as plaintiff should take nothing. An appeal was timely filed.

The Notice of Appeal, filed June 12, 1997, in its style designates "NTC of America, Inc." as plaintiff. The body of the Notice of Appeal reads, "Plaintiff, John H. Williams Jr. ("Plaintiff") as Plan Trustee pursuant to the Plan of Reorganization for NTC of America, Inc. appeals [the bankruptcy court's order]." The list of parties to the order appealed from and the names of their respective attorneys reads:

NTC of America, Inc.
c/o John H. Williams, Jr.
Plan Trustee
[address]

Melinda J. Martin, OBA #[]
MELINDA J. MARTIN, P.C.
[address]
Attorney for Appellant, NTC of America, Inc.

All other parties listed were defendants/appellees. Defendants/appellees argue that neither NTC nor John H. Williams, Jr. ("Plan Trustee") have properly appealed because the Notice of Appeal is defective.

II. Review

The undersigned recommends that the District Court find that: the Notice of Appeal complies with the requirements of Bankruptcy Rule 8001; the District Court has jurisdiction to hear this appeal;

the Plan Trustee is the proper appellant in this appeal; and the Plan Trustee should, upon motion, be promptly substituted for NTC, the former debtor in possession.

A. Bankruptcy Rule 8001

Notice of appeal of a bankruptcy court judgment or order is governed by Bankruptcy Rule 8001. Rule 8001,[2] like Fed. R. App. P. 3(c),[3] upon which it is modeled, is jurisdictional in nature.[4] The failure to comply with its dictates forfeits a party's right to appeal. Defendants/appellees note

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[2] Bankruptcy Rule 8001(a) reads in part:

> The notice of appeal shall conform substantially to Official Form No. 34, shall contain the names of all parties to the judgment, order or decree appealed from and the names, addresses and telephone numbers of their respective attorneys, and be accompanied by the prescribed fee.

[3] Fed. R. App. P. 3(c) states:

> Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

[4] Although Bankruptcy Rule 8001 was derived from Fed. R. App. P. 3(c), there are distinctions between the two rules. Some courts have read Rule 8001 to be more severe in its application than Rule 3(c), noting Rule 8001's lack of a provision excusing informalities, such as that contained in Rule 3(c), and addition of a provision requiring the listing of all parties to the order appealed from and their attorneys. See Storage Technology Corp. v. U.S. District Court, 934 F.2d 244 (10th Cir. 1991)(superseded by rule as stated in Dodger's Bar & Grill, Inc. V. Johnson County Board of County Commissioners, 32 F.3d 1436 (10th Cir. 1994))("[t]he requirements for filing a notice of appeal under Bankruptcy Rule 8001(a) are more strict than those of Fed.R.App.P. 3(c)"); In re Pettibone Corp., 145 B.R. 570 (N.D. Ill. 1992). Other courts have found Rule 8001 to, in some situations, be less stringent in its requirements than Rule 3(c), taking their guidance from the distinction between Rule 3(c)'s use of the word "specify" and Rule 8001's use of the less-restrictive "contain." See In the Matter of Case, 937 F.2d 1014 (5th Cir. 1991)("Rule 8001 lacks the 'specify' requirement that [Torres v. Oakland Scavenger Company, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988)] concluded was the essence of FED.R.APP.P. 3(c)"). The undersigned recommends that the imprecision in the instant appeal does not offend the requirements of Bankruptcy Rule 8001, even under the stricter application of its requirements.

that the deadline for appealing the order at issue has expired. Thus, the issue is whether the Notice of Appeal filed June 12, 1997 is effective to confer jurisdiction in the District Court, or whether it is defective, thus forfeiting the right of NTC or the Plan Trustee to appeal.

The undersigned recommends a finding that the Notice of Appeal as filed is not defective as to an appeal by the Plan Trustee from the May 29, 1997 order. The Notice of Appeal as filed complies with the technical requirements of Bankruptcy Rule 8001 in that it states that the Plan Trustee, pursuant to his appointment under the plan, appeals from the May 29, 1997 order of the Bankruptcy Court.

While perhaps not perfectly drawn, the Notice of Appeal as filed does not vary from a precisely drawn notice to the extent that it runs afoul of the particularity or purpose of Bankruptcy Rule 8001. "The purpose of requiring the filing of a timely notice of appeal is to advise the opposing party that an appeal is being taken from a specific judgment, and such notice should therefore contain sufficient information so as not to prejudice or mislead the appellee." Markham v. Holt, 369 F.2d 940, 942 (5th Cir. 1966). No party to the order appealed from could have been misled in any significant way by the imprecision of the Notice of Appeal as filed, and certainly no party was prejudiced by such imprecision.

This is not a case where the defendants/appellees had to speculate as to which one of a multiple possibility of plaintiffs/appellants had actually appealed. From the filing of the Empire adversary proceeding through the time of trial, NTC, as debtor in possession, was the plaintiff; after the trial, but before the Bankruptcy Court issued its judgment, a plan was confirmed and a Plan Trustee succeeded the debtor in possession as the real party in interest. All of the defendants/appellees were aware--from the Notice of Appeal, if nothing else--that a plan had been

confirmed and a Plan Trustee appointed. The actual notice given did not in any way suffer from the imprecision in the Notice of Appeal as filed.

According to the plan, the Plan Trustee was specifically given the post-confirmation powers necessary to bring this appeal. The plan stated, in addition to other, even more specific language, "[P]ursuant to this Plan and Section 1123 (b) (3) (B) of the Bankruptcy Code, the Plan Trustee shall be the proper party in interest to appear and litigate all matters to which the Debtor (as debtor-in-possession or otherwise) would have been the proper party in interest prior to the Effective Date." Plaintiff's Response Brief at 7. The distinction between the Notice of Appeal including both the Plan Trustee's name and the name of the former debtor in possession, whose former rights the Plan Trustee is now exercising, and the Plan Trustee being substituted and appealing under his own name is too slight to offend even the strict requirements for notice of appeal under Rule 8001.

B. Substitution

The order appealed from in the instant case was filed May 29, 1997, nearly five years after the trial was concluded in August, 1992. In the time between the conclusion of the trial and the issuance of the order and judgment at issue, the Bankruptcy Court entered an "Order Confirming Debtor's Liquidating Plan of Reorganization." The order confirming the plan of reorganization was filed January 2, 1996 and appointed John H. Williams, Jr. to perform, as Plan Trustee, the duties of the debtor, NTC. According to the plan, the Plan Trustee became the duly appointed "representative" of the Estate, as contemplated by Section 1123(b)(3)(B) of the Bankruptcy Code, and was specifically given the power to prosecute the Empire adversary proceeding that is the subject

of the instant appeal.[5] The plan, as confirmed by the Bankruptcy Court, provides that the Plan Trustee shall be the proper party in interest to appear and litigate for NTC. Thus, the Plan Trustee is the proper party in interest to the Empire adversary proceeding which is the subject of the instant appeal.[6]

There has not been a motion to substitute the Plan Trustee for the former debtor in possession. Bankruptcy Rule 7025 provides that, in adversary proceedings in bankruptcy, substitution of parties is governed by Fed. R. Civ. P. 25, which states:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. . . .

Fed. R. Civ. P. 25(c). Bankruptcy Rule 7017 makes Fed. R. Civ. P. 17 applicable to adversary

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[5] Defendants/appellees, citing In re Mako, Inc., 985 F.2d 1052 (10th Cir. 1993); In re Sweetwater, 884 F.2d 1323 (10th Cir. 1989); and Harstad v. First American Bank, 39 F.3d 898 (8th Cir. 1994), suggest in their response that the appointment of the Plan Trustee was not valid and that certain claims were not retained under the plan. The Tenth Circuit has adopted a two-part test for the appointment of a representative of the estate under 11 U.S.C. § 1123(b)(3)(B). In re Sweetwater, 884 F.2d 1323 (10th Cir. 1989). This test requires that a party who is neither the debtor nor the trustee, but who seeks to enforce a claim establish that (1) the party has been appointed; and (2) the party is a representative of the estate. See Mako, 985 F.2d at 1054 (quoting Temex Energy, Inc. v. Hastie & Kirschner (In re Amarex, Inc.), 96 B.R. 330 (W.D. Okla. 1989)). The first element may be met through the approval of the plan. Mako, 985 F.2d at 1054 (citing Sweetwater, 884 F.2d at 1326). In Mako, the Tenth Circuit held that an underlying inquiry in establishing whether the second element is met is whether there is clear evidence of the reservation of avoidance powers to the party now seeking to exercise those powers. Mako, 985 F.2d at 1055, 1056.

In the case before the undersigned, the plan has been approved and the avoidance powers have been reserved--with great specificity and detail--to the Plan Trustee. The undersigned recommends a finding that the Plan Trustee is the duly appointed representative of the estate and has the power to seek the avoidance of the transfer at issue in the Empire adversary proceeding. The undersigned fails to see how remand for any further fact finding, as suggested by the defendants/appellees, is necessary to the determination of this issue.

[6] Bankruptcy Rule 2012, while not directly applicable, is informative as to this matter. That rule provides for the automatic substitution of a trustee for the debtor in possession where the trustee was appointed pursuant to the Bankruptcy Code.

proceedings in bankruptcy, and Rule 17 provides in part:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Fed. R. Civ. P. 17(a). The plan provides that, following plan confirmation, the Plan Trustee automatically became the real party in interest for the purposes of prosecuting the Empire adversary proceeding and any appeal. Fed. R. Civ. P. 25 does not allow the District Court to order the substitution of parties unless the parties have so moved. A motion to substitute appellant is in order.

III. Conclusion

For the reasons discussed above, the undersigned recommends that the District Court find that the Notice of Appeal as filed complies with the requirements of Bankruptcy Rule 8001, and that the District Court has jurisdiction to hear this appeal. The undersigned recommends that the District Court further find that the Plan Trustee, acting in his capacity as a representative of the estate, is the proper appellant in this appeal and should, upon motion by the Plan Trustee, be promptly substituted for NTC, the former debtor in possession. The undersigned recommends that the Joint Motion to Dismiss Appeal be **DENIED**.

IV. Objections

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise these Proposed Findings and Recommendations or whether to recommit the matter to the undersigned. As part of his review of the record, the District Judge will consider the parties' written objections to these Proposed Findings and Recommendations. A party wishing to file objections must do so within ten days after being served with a copy of these Proposed

Findings and Recommendations. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in these Proposed Findings and Recommendations that are accepted or adopted by the District Court. See Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992); Niehaus v. Kansas Bar Ass'n., 793 F.2d 1159, 1164-65 (10th Cir. 1986) (superseded by rule on grounds not relevant to holding on waiver of right to appeal).

Dated this 3rd day of April, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RIVER OAKS DEVELOPMENT CORPORATION, an Oklahoma corporation; Lorice T. Wallace, trustee of the LORICE T. WALLACE REVOCABLE TRUST, and the LORICE T. WALLACE FAMILY LIMITED PARTNERSHIP, an Oklahoma limited partnership,

Plaintiffs,

v.

MNA, INC., a Colorado corporation; NAIM G. NASSAR, an individual; and MACE L. PEMBERTON, an individual,

Defendants.

Case No. 97-C-68-H

ORDER

This matter comes before the Court on a motion for partial summary judgment (Docket # 51) by Plaintiffs River Oaks Development Corporation ("River Oaks"), the Lorice T. Wallace Revocable Trust ("Wallace Trust"), and the Lorice T. Wallace Family Limited Partnership ("Wallace Partnership") and a motion for partial summary judgment (Docket # 50) by Defendants MNA, Inc. ("MNA"), Naim G. Nassar, and Mace L. Pemberton.

MNA is a Colorado corporation formed in March of 1996. Defendant Nassar was the President and Chief Executive Officer of MNA. On March 4, 1996, Moy-Nassar Associates, Inc. ("Moy-Nassar"), whose President was Mr. Nassar, merged into MNA. On July 19, 1996, MNA and River Oaks executed a letter agreement setting forth the engineering services which MNA was to perform in connection with the construction of a golf course and residential development. The contract required MNA to provide assistance in obtaining an earth change permit from the

City of Tulsa and to submit a mass grading plan for soil taken from a channel dug on Plaintiffs' property. During the period of the contract, MNA was not licensed by the Oklahoma Secretary of State to do business in Oklahoma. On February 6, 1998, however, MNA became licensed to do business in the state.

River Oaks asserts the following claims against Defendant MNA: breach of contract by MNA in its obligation to provide Plaintiffs with a mass grading plan for the River Oaks golf course and residential community project; professional negligence by MNA by not developing a grading plan meeting the needs of the client and by failing to develop a grading plan for the City of Tulsa; and breach of the implied covenant of good faith and fair dealing by failing to inform Plaintiffs of the mass grading plan changes, and by misrepresenting to Plaintiffs that changes or inconsistencies in the grading plan would occur.

The Wallace Trust and the Wallace Partnership assert the same claims for breach of contract, professional negligence, and breach of the implied covenant of good faith and fair dealing as a third party beneficiary of the contract between River Oaks and MNA. The Wallace Trust and Wallace Partnership also allege these claims against Defendant Nassar in an individual capacity, claiming that he is personally liable because the corporation was not registered to do business in Oklahoma. Plaintiffs' claim against Mr. Pemberton is for breach of the implied covenant of good faith and fair dealing for alleged misrepresentations he made as project manager for MNA.

MNA has brought a breach of contract counterclaim against River Oaks, alleging that River Oaks has failed to pay the balance of $8,833.03 it owes under the contract. MNA also seeks an amendment of a lien on Plaintiffs' property for unpaid services, to reflect that the correct

landowner of the property is the Wallace Trust. MNA also requests foreclosure of that lien. Further, MNA claims that there existed a quasi/implied contract with River Oaks in that it accepted and benefitted from MNA's services. Both Plaintiffs and Defendants have moved for partial summary judgment as to several of their respective claims.

I

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court

stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

II

Plaintiffs claim that Mr. Nassar is individually liable here because MNA was not registered to do business in Oklahoma. Plaintiffs also allege that since MNA obtained a certificate to do business in Oklahoma shortly after the pretrial conference, MNA cannot claim that it was not required to register previously. In contrast, Defendants argue that MNA was not required to register in Oklahoma because it did not do business in the state, because any liability to Plaintiffs was not a "debt" within the meaning of the statute, and because personal liability only applies in cases where a corporation's license to do business has been forfeited, not when a corporation

never obtained a license.

The Oklahoma Franchise Tax Code, the statute governing this issue, applies to every corporation "doing business in Oklahoma." Okla. Stat. tit. 68, § 1201. Officers and directors of corporations covered under the Franchise Tax Code are personally liable for certain debts of the corporation unless the corporation obtains a license and pays applicable taxes. This section provides in pertinent part as follows:

> Each trustee, director, or officer of any such corporation, association or organization, whose right to do business within this state shall be forfeited, shall, as to any and all debts of such corporation, association or organization, which may be created or incurred with his knowledge, approval and consent, within this state after such forfeiture and before the reinstatement of the right of such corporation to do business, be deemed and held liable thereon in the same manner and to the same extent as if such trustees, directors, and officers of such corporation, association or organization were partners. Any corporation, association or organization whose right to do business shall be thus forfeited shall be denied the right to sue or defend in any court of this state . . . .

Okla. Stat. tit. 68, § 1212(c).

For a corporation to be "doing business" within the state such that it is required to obtain a license, the corporation must do or perform

> a series of acts which occupy the time, attention, and labor of men for the purpose of livelihood, profit or pleasure. It is well settled upon authority that the doing of a single act pertaining to a particular business or transaction will not be considered carrying on, transacting, or doing business. The mere term itself implies more than one transaction. "The doing of a single act of business in another state does not constitute the doing of business within the meaning of foreign corporation laws . . . ."

ABC Drilling Co. v. Hughes Group, 609 P.2d 763, 769 (Okla. 1980) (quoting Fuller v. Allen, 148 P. 1008 (Okla. 1915)).

Defendants claim that since MNA was not "doing business" in Oklahoma, Mr. Nassar

be personally liable for any debts of the corporation. Specifically, Defendants allege that MNA did not maintain any employees or property in Oklahoma and that Plaintiffs contacted it in Colorado. Defendants further state that the contract at issue was MNA's sole act of business in the state. Even if MNA was "doing business" in Oklahoma, Defendants further argue that Mr. Nassar is not personally liable because there are no "debts" of the corporation within the meaning of the statute. Defendants claim that the term "debts" applies only when a corporation contracts to pay or to borrow money and subsequently does not pay that amount. Defendants contend that the term "debts" does not apply in the instant case, since MNA did not incur a debt, but rather incurred potential contractual or tortious liability.

In contrast, Plaintiffs argue that MNA was "doing business" in Oklahoma because Mr. Nassar came to Tulsa to meet with the parties to the contract and because he renewed his professional registration in the state. Further, Plaintiffs allege that MNA was "doing business" in the state because it merged on March 4, 1996, with another corporation, Moy-Nassar, which had previously engaged in business transactions in Oklahoma.

The Court finds that MNA was not "doing business" within Oklahoma and thus was not required to obtain a license in this state. The transaction with Plaintiffs is not a "series of acts" which would constitute "doing business" within the state. The Court also finds that the prior acts of Moy-Nassar were not sufficient to render MNA "doing business" in Oklahoma. Although Moy-Nassar never maintained an office or assets in Oklahoma, on April 4, 1994, it contracted with another Colorado corporation to perform structural engineering services on a Foley's store in Tulsa. The contract was entered into in Colorado and Moy-Nassar performed its engineering services for the store in Colorado. Thus, the previous transaction of Moy-Nassar in Oklahoma

was also not a "series of acts" in Oklahoma which would require MNA to register.

The Court further finds that MNA's subsequent registration in the state is not dispositive as to whether MNA was doing business in Oklahoma at the time of this contract. Instead, it appears to be a precautionary measure taken by the corporation. Additionally, even if MNA was "doing business" in Oklahoma, the Court finds that the contractual or tortious liability in the instant case is not a corporate "debt" within the meaning of the statute. Accordingly, Mr. Nassar cannot be held personally liable in the instant case. Defendants' motion for summary judgment on this basis is hereby granted. Plaintiffs' motion for summary judgment on this basis is hereby denied.

III

Plaintiffs also assert a claim against Mr. Pemberton for breach of the implied covenant of good faith and fair dealing. Plaintiffs suggest that Mr. Pemberton is personally liable because this claim "is in the nature of a tort." Pls.' Resp. at 8. The Court notes, however, that unless there is "'gross recklessness or wanton negligence on behalf of a party' to a commercial contract, a breach of the implied covenant of good faith and fair dealing merely results in a breach of contract." First Nat'l Bank & Trust Co. of Vinita v. Kissee, 859 P.2d 502, 509 (Okla. 1993) (quoting Rogers v. Tecumseh Bank, 756 P.2d 1223, 1227 (Okla. 1988)). Since there are no allegations of gross recklessness or wanton negligence and since Mr. Pemberton was not a party to the contract, but was instead merely a corporate representative, Mr. Pemberton cannot be held personally liable on this claim. Accordingly, Defendants' motion for summary judgment on this basis is hereby granted.

IV

Plaintiffs further move for summary judgment on its breach of contract claim for Defendants' "failure to provide the plaintiffs with the assistance in obtaining the City of Tulsa earth change permit" and to provide a grading plan for the Tulsa property. Pls.' Br. at 6. MNA contends that although it was contractually obligated to provide assistance in obtaining the permits, it was not required to actually obtain those permits. MNA further claims that Plaintiffs are estopped from arguing a breach of this provision because Stephen P. Wallace, President of River Oaks, admitted in a series of September, 1996 letters that the parties were not able to seek the permits from Tulsa due to time constraints. Alternatively, MNA contends that if it was required to obtain the permits, there was an oral amendment to the contract to alter that obligation.

Under the doctrine of estoppel, "if a party leads one to believe that he will not insist upon literal performance of a contract term and the other party detrimentally relies thereon, the first party will be estopped from demanding literal compliance." Oklahoma Oil & Gas Exploration Drilling Program 1983-A v. W.M.A. Corp., 877 P.2d 605, 609 (Okla. Ct. App. 1994) (citing Poteau State Bank v. Denwalt, 597 P.2d 756, 759 (Okla. 1979)). See also Chimney Rock Ltd. Partnership v. Hongkong Bank of Canada, 857 P.2d 84, 89 (Okla. Ct. App. 1993).

The Court finds that there are material issues of fact as to the requirements of the contract, as to whether Plaintiffs are estopped from asserting this claim, and as to whether there was an oral amendment to the contract. These disputed issues preclude the granting of summary judgment on this basis. Accordingly, Plaintiffs' motion for summary judgment on this claim is hereby denied.

V

Plaintiffs further move for summary judgment on the breach of contract claim, alleging that the grading plan was deficient because the plan did not place the soil in the correct location and manner. MNA states that the grading plan was submitted to Plaintiffs and that Plaintiffs modified the plan by adding another soil deposit area. MNA argues that by accepting the work without objection and by using the plan, Plaintiffs are estopped from now claiming that the plan was defective. In its response to Defendants' motion for summary judgment, Plaintiffs claim that they did not approve the plan and that Defendants promised to revise the plan from stockpiles of soil to the spreading of the soil.

The Court finds that there are material issues of fact which preclude the granting of summary judgment on this claim. Specifically, there are factual disputes as to whether the grading plan satisfied the contractual obligations and whether Plaintiffs accepted the work and are now estopped from any objection to the plan. Accordingly, Plaintiffs' motion for summary judgment on this issue is hereby denied.

VI

MNA has also moved for summary judgment on its counterclaim, alleging breach of contract because River Oaks has failed to pay the balance of $8,883.03 owed under the contract. Because there are disputed issues of fact as to whether MNA has breached this contract, the Court also finds that summary judgment on this counterclaim is inappropriate. Accordingly, Defendant's motion for summary judgment on this claim is hereby denied.

VII

For the reasons set forth above, Plaintiffs' motion for partial summary judgment (Docket #

51) is hereby denied. Defendants' motion for partial summary judgment (Docket # 50) is hereby granted in part and denied in part. Plaintiffs' motion to dismiss (Docket # 41) is hereby denied as moot. Since this order eliminates issues from the case, the previously-filed motion in limine will require modification. Thus, this motion (Docket # 29) is hereby denied as moot and may be reurged, as appropriately modified, in accordance with the scheduling order previously entered in this case.

IT IS SO ORDERED.

This 3RD day of April, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAWNA LEWIS, now DAWNA COLES, an individual,	)	FILED
	)	APR - 3 1998
Plaintiff,	)	Phil Lombardi, Clerk
	)	U.S. DISTRICT COURT
vs.	)	**Case No. 97-CV-699 B (W)**
	)	
MAVERICK RESTAURANT CORPORATION, a/k/a AMARILLO GRILL, INC., d/b/a COTTON PATCH, a corporation, and MARK JENSEN, an individual,	)	ENTERED ON DOCKET
	)	DATE APR 06 1998
Defendants.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW Plaintiff, DAWNA LEWIS, now DAWNA COLES, an individual, in the above-named case and dismisses with prejudice all claims asserted in her Complaint filed against Defendants MAVERICK RESTUARANT CORPORATION, a/k/a/ AMARILLO GRILL, INC., d/b/a COTTON PATCH, a corporation, and MARK JENSEN, an individual, pursuant to Fed.R.Civ.Pro. 41(a)(1)(ii). Each party to bear its own attorneys fees and costs.

IT IS SO STIPULATED.

Dated: 3-26-98

GARRISON, BROWN, CARLSON, BUCHANAN & BUSBY

By: _____

William W. Busby
530 Southeast Delaware
P.O. Box 1217
Bartlesville, OK 74005
(918) 336-2520
Attorneys for Plaintiff Dawna Lewis-coles

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CLJ

RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

Dated: 3/16/98 By: Ted Sherwood

Ted Sherwood
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161
Attorneys for Defendant Amarillo Mesquite Grill, a/k/a Amarillo Grill, Inc., d/b/a Cotton Patch

GLEN E. DAVIS & ASSOCIATES

Dated: 4-1-98 By: Glenn E. Davis

Glenn E. Davis, Esq.
501 South Johnstone, Suite 601
Bartlesville, OK 74003
(918) 337-0744
Attorneys for Defendant Mark Jensen

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANK S. LETCHER, M.D.,

Plaintiff,

vs.

ST JOHN MEDICAL CENTER, INC., an Oklahoma corporation; JOHN ALEXANDER, M.D.; AND KENYON KUGLER, M.D.,

Defendants.

Case No.98-CV-244-BU (M)

FINDINGS AND RECOMMENDATION

Plaintiff's motion for preliminary injunction[1] [Dkt. 3] has been referred to the undersigned United States Magistrate Judge. A hearing was held on the matter on April 1, 1998. Pursuant to 28 U.S.C. § 636(b)(1)(B) the undersigned submits the following findings of fact and recommendation for disposition.

BACKGROUND

Plaintiff filed suit against St. John Medical Center ("St. John") and other defendants in Tulsa County District Court on March 27, 1998. The suit was removed to this Court by St. John on the alleged basis of federal question jurisdiction. In his suit, Plaintiff alleges that St. John arbitrarily and capriciously terminated his medical staff privileges, thereby depriving him of a valuable property right without giving him any notice and opportunity to be heard in violation of St. John's own By-laws and Standard Operating Procedures ("SOPs"); regulations of the Joint Committee on

[1] Plaintiff's motion is actually titled: Application for Temporary Injunction. Since the case has been removed to federal court, the appropriate terminology under Fed.R.Civ.P. 65 is preliminary injunction. That term has been used throughout.

(16)

Accreditation of Hospital Organizations ("JCAHO"); and the requirements of the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101, *et seq.* Plaintiff has invoked 42 U.S.C. § 1983 as a basis for liability, asserting that St. John's actions "caused Dr. Letcher to be deprived of the rights, privileges, and immunities secured to him by the Federal Constitution," specifically the 5th and 14th Amendments to the United States Constitution. [Dkt. 2, petition p. 10]. This allegation provided the basis for removal of the action to this Court. Plaintiff has also asserted state law claims for breach of contract, civil conspiracy and defamation. These findings of fact and recommendation for disposition concern Plaintiff's request for a preliminary injunction.[2]

Plaintiff is a neurosurgeon who has had staff privileges at St. John for over 15 years. On February 16, 1998, without any notice to Plaintiff that St. John was considering terminating his staff privileges, St. John sent Plaintiff a letter [Plaintiff's Exhibit 1] advising him that his staff privileges were terminated. Following the termination, St. John initially refused to grant Plaintiff any hearing or appeal regarding the termination, however, after conferences between counsel St. John has now granted Plaintiff an appeal hearing before three members of its board of directors which is scheduled for April 16, 1998.

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[2] At the conclusion of the argument on this motion, Plaintiff also requested that the Court order St. John to adhere to the hearing procedure set forth in its by-laws at the hearing on April 16, 1998. While the Court is of the view that those procedures might serve as an excellent guide for the hearing, this request is not properly before the Court and no such order will issue.

The parties agree, and the evidence shows, that St. John's reason for the termination of Plaintiff's staff privileges was not due to questions of clinical judgment or patient care, but stemmed from what St. John characterized as Plaintiff's "pattern of inappropriate and unacceptably disruptive conduct toward St. John employees." [Plaintiff's Exhibit 1].

JURISDICTION

At every turn, a federal court is required to inquire into its jurisdiction. *Penteco Corporation Limited Partnership--1985A v. Union Gas System, Inc.*, 929 F.2d 1519 (10th Cir. 1991). In this case federal jurisdiction is premised on Plaintiff's civil rights claim brought under 42 U.S.C. § 1983 and the alleged violations of the HCQIA. Liability attaches under § 1983 only if defendants have deprived plaintiff of a right secured by the United States Constitution while they acted under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Plaintiff acknowledges that St. John is not a public hospital, but argues that its receipt of Hill-burton Act construction funds; Medicare and Medicaid reimbursements; and its status with taxing authorities places it into a *quasi*-public status, making it liable under § 1983 for the alleged due process violations. The Court notes that no authorities were cited for this proposition and that the Tenth Circuit rejected such arguments in *Ward v. St. Anthony Hosp.*, 476 F.2d 671 (10th Cir. 1973).

Federal jurisdiction is also predicated on the HCQIA, 42 U.S.C. § 11101, *et seq.* The HCQIA was enacted to improve the quality of health care. The Act

encourages effective peer review of physicians by providing immunity from damage suits to professional peer review groups and individuals acting in support of those groups. The immunity is conditioned on providing adequate due process which is defined in the act, to the physician being reviewed. The Tenth Circuit has held that the HCQIA does not expressly or impliedly create a private cause of action in favor of a physician who was allegedly denied the due process protections of the Act. *Hancock v. Blue Cross-Blue Shield of Kansas, Inc.*, 21 F.3d 373, 374-75 (10th Cir. 1994).

In view of the foregoing, the undersigned has serious doubts about the existence of federal jurisdiction over this matter. However, since the only matter referred to the undersigned for consideration is the motion for preliminary injunction, the Court will proceed to address that matter.

DISCUSSION

It is most disturbing to the Court that, when dealing with a subject as vital to a physician, especially a surgeon, as his staff privileges at a medical center, the medical center would terminate his staff privileges without any notice to the physician that such action is being considered and without giving him an opportunity to present his side of the matter to the decision maker in some meaningful way. However, it must be kept in mind that, at this stage of the proceedings, the Court is not focused primarily on the merits of the case, but rather on the four factors which have been established to determine if the extraordinary and drastic remedy of a preliminary injunction should issue.

To obtain a preliminary injunction, Plaintiff must establish:

(1) that he will suffer irreparable injury absent the injunction;

(2) that the threatened injury to him outweighs any damage the injunction may cause his opponent;

(3) that the injunction would not be adverse to the public interest; and

(4) that he has a substantial likelihood of success on the merits.

SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991); *Lundgrin v. Claytor*, 619 F.2d 61 (10th Cir. 1980). Generally, because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal. *SCFC*, 936 F.2d at 1098. However, because the requested injunction would disturb the status quo and be mandatory in nature, Plaintiff must satisfy the even heavier burden of showing that the four factors weigh heavily and compellingly in his favor. SCFC, 936 F.2d at 1099.

The first factor addresses whether Plaintiff will suffer irreparable harm absent the injunction. If Plaintiff has an adequate remedy at law, the harm is not irreparable. Plaintiff claims loss of income, damage to his reputation, possible loss of third party payor contracts, and emotional damage to himself and his family. Additionally, although Plaintiff also has privileges at another Tulsa medical center, he asserts damage to his patients because he is unable to schedule surgeries for some of his patients at the other hospital because of restrictions mandated by their health insurers. However, none of those surgeries were identified as emergencies, and those surgeries could be performed by another surgeon.

The Court is guided by the language the Supreme Court quoted from *Virginia Petroleum Jobbers Assoc. v. Federal Power Comm'n* 259 F.2d 921, 925 (D.C. Cir. 1958) in *Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 953, (1974) when it determined that loss of income and damage to reputation was not the type of irreparable injury that is a necessary predicate to the issuance of a temporary injunction against discharge pending review by the Civil Service Commission:

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. [emphasis in original].

While the Court in no way minimizes these alleged damages, this nature of damages are routinely compensated by way of money damages. The Court finds that the harm of which Dr. Letcher complains is not "irreparable" as that term is used in the context of a preliminary injunction. See also *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center,* 684 F.2d 1346, 1349 (7th Cir. 1982).

The second factor considers whether the threatened injury to the movant outweighs any damage the injunction may cause the opponent of the injunction. Dr. Letcher alleges financial harm, damage to his reputation, emotional damage and that his patients will continue to suffer pain until such time that he is able to schedule their surgeries at St. John or elsewhere. St. John asserts that the injunction would essentially make it appear impotent to deal with behavior patterns by members of its medical staff that it considers to be unacceptable thereby compromising patient care.

The Court recognizes that both parties have substantial interests at stake in this dispute. However, in light of the de novo hearing before a committee of the Board set for April 16, 1998, which will provide Plaintiff with a prompt forum to possibly resolve this matter within the internal procedures of St. John, the Court cannot find that the injury to the Plaintiff, during this short time frame, outweighs the damage the injunction may cause to St. John.

The third factor considers whether the injunction would be adverse to the public interest. Neither party presented substantial evidence, one way or the other, on the issue of whether Plaintiff is, in fact, a disruptive physician. Obviously, if Plaintiff is a disruptive physician, the public has an interest that he not compromise the quality of patient care at St. John. However, because the Board of Directors' decision that Plaintiff is a disruptive physician was based upon a presentation without any input from Plaintiff, the Court cannot conclude that decision was accurate. Thus, the evidence of record on this factor is inconclusive and weighs neither for or against the issuance of an injunction.

The fourth factor is whether plaintiff has a substantial likelihood of success on the merits. Plaintiff has made no such showing. Plaintiff has no cause of action under the HCQIA and there is no "state action" upon which to predicate liability under 42 U.S.C. § 1983. Furthermore, concerning his state law claims, in a 1976 case the Oklahoma Supreme Court held that a private hospital's actions in terminating a physician's staff privileges were not subject to judicial review. *Ponca City Hospital, Inc. v. Murphree*, 545 P.2d 738,741 (Okla. 1976). In that case the Court did not

reach the question of whether the hospital's by-laws created contractual rights. However, there is authority that it does not. *Rockland Physician Assoc., P.C. v. Grodin*, 616 F.Supp. 958, 961 (S.D.N.Y. 1985) (New York law).

CONCLUSION

Throughout the above analysis, the Court has been greatly influenced by the assertion of St. John that it will provide Plaintiff with a prompt, full and fair hearing concerning this matter. For the reasons set forth above, the Court concludes that Plaintiff has failed to meet the heavy burden to show that the four factors discussed above weigh heavily and compellingly in his favor. The undersigned United States Magistrate Judge, therefore, RECOMMENDS that Plaintiff's motion for preliminary injunction be DENIED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to these findings of fact and recommendation for disposition must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed herein. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 3rd day of April, 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

REGINA L. BLATION,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 97-C-615-J

ORDER

Upon the motion of the defendant, Acting Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action.

DATED this 2 day of April 1998.

SAM A. JOYNER
United States Magistrate Judge

(11)

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARKIE K. GARNER, in person and for all persons similarly situated,

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

Case No.96-CV-91-K
(Base File)

PATRICK BRAUN,

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

Case No. 96-CV-480-B

ORDER

The Motion for Summary Judgment filed by Defendants Berry, Klatt, and Sloan is before the Court.[1]

BACKGROUND

Plaintiff Patrick Braun, an inmate currently incarcerated at the Oklahoma State Penitentiary, proceeding pro se and in forma pauperis, brings this action pursuant to 42

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[1] The documents relevant to this motion are found in two case files; 96-CV-91-B and 96-CV-480-B. A number of prisoner civil rights cases concerning the Mayes County Jail were filed in a relatively short period of time. Some of the cases were consolidated with 96-CV-91-K, all of the cases were assigned to a single Magistrate Judge for the management of pre-trial matters, and the officials responsible for operation of the Mayes County Jail were ordered to prepare a single Report addressing all of the cases. Although Plaintiff's case, 96-CV-480-B was not one of the consolidated cases, Defendants' motion for summary judgment was filed in the base file for the consolidated cases, 96-CV-91-K.

Hereafter, file documents are referred to by a combination of case number and docket number. Accordingly, Defendants' motion for summary judgment, docket number 62 in Case No. 96-CV-91-K, is designated as [Dkt. 91-62]; the report is [Dkt. 91-49], and Plaintiff's response to the motion for summary judgment, docket number 22 in Case No. 96-CV-480-B is [Dkt. 480-22].

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U.S.C. § 1983, alleging that the defendants have violated his constitutional rights while he was held as a pre-trial detainee at the Mayes County Jail.

Following his waiver of extradition and consent to return to the State of Oklahoma, Plaintiff was transported from Hill County, Texas to Mayes County, Oklahoma by Defendants George Klatt and Carl Sloan, Mayes County Sheriff's Deputies. During the drive, Plaintiff related that he had "stiffed" some people on drug deals. The deputies interpreted his statements as an exaggeration of his criminal activity and an attempt to impress them. During the booking process Plaintiff informed the deputies that he was afraid to be placed in the bullpen because of the people he had "stiffed." He mentioned that he was particularly fearful of the Sitsler and Barnes families from whom he supposedly stole $200,000 worth of drugs. However, Plaintiff acknowledges that neither the Sitsler nor Barnes family members were incarcerated at Mayes County Jail at the time and he just wanted to be by himself.

Plaintiff was placed in a second floor cell, away from the first floor bullpen. According to the defendants, a problem among inmates created the need to relocate an inmate to the second floor and necessitated Plaintiff's move to the bullpen. Shortly after he was moved to the bullpen, Plaintiff was jumped by five inmates. Plaintiff claims that in the course of breaking up the fight, deputies sprayed him with Oleoresin Capsisum spray ("pepper spray"). According to Defendant Klatt, Plaintiff suffered a bloody nose and minor contusions on his face. Plaintiff washed his face, an antiseptic was administered, and he was returned to the bullpen without further incident. Since Defendant Klatt did not notice signs of any serious injury, no further action was taken to provide medical care. Plaintiff

claims that he suffered a broken nose; his eyes were swollen shut; his ear was damaged; his ribs were cracked or bruised; and his back was hurt. He states that he requested to see a doctor or to be transferred to the hospital but that Klatt refused his requests. [Dkt. 480-12, p. 4]. He claims to continue to suffer back pain and blurred vision. *Id.,* at 5.

Plaintiff's amended complaint alleges: the defendants failed to protect him from physical violence at the hands of other prisoners; he was denied medical treatment for injuries received as a result of inmate violence; he was sprayed with pepper spray; and food preparation at the jail is unsanitary. Plaintiff seeks money damages and injunctive or declaratory relief. Since Plaintiff is proceeding pro se, the court must construe his complaint liberally. *Ruark v. Solano*, 928 F.2d 947, 949 (10th Cir. 1991).

Defendants' motion is supported by a special report filed in compliance with court order. [Dkt. 91-49]. Plaintiff has filed a response. [Dkt. 480-22].

I. LEGAL STANDARDS

A. Qualified Immunity

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. *See Dixon v. City of Lawton,* 898 F.2d 1443, 1447 (10th Cir. 1990). However, a qualified immunity shields government officials performing discretionary functions from civil damages liability unless the official has violated "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In establishing qualified immunity, the Supreme Court has recognized that when government officials abuse their offices, an action for damages may

offer the only realistic avenue to vindicate constitutional guarantees. This is balanced against the fact that suits against government officials can entail substantial societal costs, which include the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Id.,* 102 S.Ct. at 2736.

The tension between vindication of constitutional guarantees on the one hand and effective discharge of official duties on the other is relieved by granting qualified immunity when the official's actions are objectively reasonable when viewed in light of legal rules that are clearly established at the time the action is taken. *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987). To give effect to the balance struck between vindication of constitutional rights and effective performance of public officials' duties, the contours of the right alleged to have been violated must be sufficiently clear that a reasonable official will know what he is doing violates that right. *Id.*, 107 S.Ct. at 3039. In *Anderson*, the Court cautioned against expressing constitutional rights too generally, lest the balance "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," be destroyed by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Anderson*, 107 S.Ct. at 3038-9.

Accordingly, it is not sufficient that somewhere in constitutional jurisprudence that the action forming the basis for suit has been held unlawful, it must be plead. Because qualified immunity protects a defendant from the burdens of trial as well as from liability, a plaintiff is required to "come forward with facts or allegations sufficient to show <u>both</u> that the defendant's alleged conduct violated the law and that the law was clearly established

when the alleged violation occurred." *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988) (citing *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987)) [emphasis supplied]. Unless the plaintiff makes such a showing, the defendant prevails. *Id.* In other words, to avoid dismissal on summary judgment, plaintiff is required to "articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity." *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995) [emphasis supplied]. If the plaintiff has identified the clearly established law and the conduct that violated the law, the defendants as moveants in a motion for summary judgment bear the normal burden of showing that no material facts remain that would defeat their claim of qualified immunity. *Pueblo*, 847 F.2d at 646.

B. Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment the nonmoving party "must establish that there is a genuine issue of material fact" and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1455-56,

89 L.Ed.2d 538 (1986). Conclusory allegations are insufficient to establish a genuine issue of fact. *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988).

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. On summary judgment, the court may treat the Report as an affidavit, but may not accept the factual findings of the Report if the plaintiff has presented conflicting evidence. *See Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991). This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. *Id.* The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972).

II. DISCUSSION

A. Individual Liability of Sheriff Harold Berry

"[P]ersonal involvement is an essential allegation in a § 1983 claim." *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996) quoting *Bennet v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976); *See Ruark v. Solano,* 928 F.2d at 950 (no respondeat superior liability under § 1983). It is well established that for a supervisor to be liable in a civil rights suit for the actions of others there must be an affirmative link between the supervisor and the constitutional deprivation. *Meade v. Grubbs*, 841 F.2d 1512, 1527 (10th Cir. 1988). That link can take the form of personal participation, an exercise of control or

discretion, or a failure to supervise. *Id.* Plaintiff must show that the defendant expressly or otherwise authorized, supervised, or participated in the conduct which caused the deprivation. *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991). Absent such a link, a supervisor is not liable for the actions of his employees. *Id.*

Plaintiff has failed to allege an affirmative link sufficient to establish individual liability as to Defendant Berry. In his sworn statement Plaintiff stated that the reason he sued Defendant Berry is because "[h]e's the sheriff. He's got the last say-so in that jail." [Case No. 96-CV-91; Dkt. 62, Ex. II, p. 88]. Plaintiff admitted he had no evidence that Defendant Berry had any knowledge of his allegations. *Id.* at 88-89. Therefore, Defendant Berry is GRANTED summary judgment in his individual capacity.

B. Liability of Carl Sloan

Plaintiff has stated that the factual basis for his suit against Defendant Sloan is that Defendant Sloan should not have allowed him to be moved from a second floor cell into the bullpen where he was beaten by other inmates. Plaintiff has admitted that he has no evidence of Defendant Sloan's participation in the decision to move him. [Dkt. 91-62, Ex. JJ, p. 40-40]. The personal participation required for liability under §1983 is lacking with respect to Defendant Sloan. Therefore, Defendant Sloan should be GRANTED summary judgment.

C. Liability of George Klatt

1) Failure to Protect

It is beyond question that inmates have a right to be reasonably protected from threats of violence and attacks by other inmates. *See Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980). As a pretrial detainee, Plaintiff's constitutional claim for failure to protect arises under the Due Process Clause of the Fourteenth Amendment. A constitutional claim for failure to protect arises if prison officials knew or should have known of a substantial foreseeable risk of danger to the Plaintiff. Neither negligence nor gross negligence is enough; the prison official's conduct must rise to a level of deliberate indifference. *Berry v. City of Muskogee*, 900 F.2d 1489, 1496 (10th Cir. 1990). The Court finds that the law was sufficiently established to overcome the first prong of the qualified immunity standard.

Next, Plaintiff is required to articulate with specificity the defendant's conduct which amounted to deliberate indifference to his safety. It is not enough that Plaintiff expressed a vague fear of the bullpen and that harm did, in fact, come to him. Rather, Plaintiff must allege facts that demonstrate conduct that disregards a known or obvious risk of harm to Plaintiff. The parties agree that Plaintiff expressed fear for his safety in the bullpen and that he was fearful of the Barnes and Sitsler families. However, Plaintiff admits that no such family members were incarcerated in Mayes County at the time. In his sworn statement taken in conjunction with the Report, Plaintiff was unwilling to more specifically name those he feared. Given the lack of specificity of Plaintiff's allegations concerning the risk of harm to him, the Court finds that Plaintiff has failed to show that Defendant Klatt's

alleged conduct violated the law. Absent such a showing, Defendant Klatt must prevail on his qualified immunity defense to Plaintiff's failure to protect claim. *See Pueblo Neighborhood Health Centers, Inc., v. Losavio,* 847 F.2d 642, 646 (10th Cir. 1988).

2) Failure to Provide Medical Care

The Supreme Court has held in the context of a §1983 action only "deliberate indifference to serious medical needs" of prisoners violates the Eighth Amendment proscription against cruel and unusual punishment. *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 785 (1976). Because Plaintiff was a pretrial detainee and not a convicted prisoner at the time of Defendant's alleged actions, this claim is governed by the Due Process Clause of the Fourteenth Amendment rather than the Eight Amendment's prohibition against cruel and unusual punishment. *City of Revere v. Massachusetts Gen. Hosp.* 463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983). However, under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. *Frohmader v. Wayne,* 958 F.2d 1024 (10th Cir. 1992) (citing *Martin v. Board of County Com'rs of County of Pueblo,* 909 F.2d 402 (10th Cir. 1990)). Thus, the standard applicable to an Eighth Amendment analysis of medical care is also applicable to a Fourteenth Amendment claim.

The two-pronged *Estelle* standard requires deliberate indifference on the part of prison officials and it requires the prisoner's medical needs to be serious. A medical need is serious if it is one that has been diagnosed by a physician as

mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. Deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment. *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980). Accidental or inadvertent failure to provide adequate medical care, or negligent diagnosis or treatment of a medical condition do not constitute a medical wrong under the Eighth Amendment. Further, a mere difference of opinion between the prison's medical staff and the inmate as to the diagnosis or treatment which the inmate receives does not support a claim of cruel and unusual punishment. *Id.*

The Court finds that the law concerning a jailer's responsibility to provide medical case is sufficiently established to overcome the first prong of the qualified immunity standard. Plaintiff's allegations that Defendant Klatt denied his requests for medical care even though he suffered a broken nose and eyes that were swollen and still bloodshot 10 days after the beating overcome Defendant Klatt's claim of qualified immunity. Accordingly, the usual summary judgment standard applies to this claim.

The Court's Order dated August 29, 1996, directed the officials responsible for the Mayes County Jail to undertake an investigation and to file a Report addressing the allegations in the Plaintiff's complaint. [Dkt. 480-13]. The Report contains the affidavit of Defendant Klatt wherein he swears that the injuries Plaintiff received were minor, not requiring medical attention. However, Plaintiff's amended complaint relates that 10 days

after his beating he saw a nurse, Ms. Wells, who authorized his treatment by an eye doctor because his eye was still bloodshot. The Report does not contain any interview or affidavit of Ms. Wells, Plaintiff's jail medical records, the records generated by the eye doctor, or any incident report or similar contemporaneous documentation of the bullpen disturbance involving Plaintiff. The omission of these items from the Report prevents the Court from determining whether there exists a genuine issue as to any material fact concerning the nature and extent of Plaintiff's injuries. Accordingly, summary judgment is DENIED as to Defendant Klatt on Plaintiff's claim of deliberate indifference to his serious medical needs.

D. Use of Pepper Spray

It is well established that the Fourteenth Amendment protects pre-trial detainees from the use of excessive force approaching punishment. *Graham v. Connor,* 490 U.S. 386, 395 n.10, 109 S.Ct. 1865, 1871 n. 10, 104 L.Ed.2d 433 (1989); *Weimer v. Schraeder,* 952 F.2d 336, 340 (10th Cir. 1991). While use of pepper spray could constitute excessive force approaching punishment, Plaintiff has not alleged facts that rise to that level. Accordingly, Defendants' motion for summary judgment is GRANTED as to this claim.

E. Liability of Sheriff Berry in his Official Capacity

Claims against a government officer in his official capacity are actually claims against the government entity for which the officer works. *Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Because section 1983 does not recognize respondeat superior as a basis for liability, in order to succeed on an official capacity claim against a county official, a plaintiff must allege that he or she suffered injuries of a constitutional magnitude as the result of an official policy, custom or practice.

Monell v. Department of Social Servs., 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A policy must be a policy statement, ordinance, regulation or decision officially adopted and promulgated by a municipality's officers. A custom must be a persistent and widespread practice of the officials. If a violation cannot be characterized as an officially adopted policy, then the municipality can be held liable only if the practice is so permanent and well settled as to constitute a custom or usage with the force of law. *Lankford v. City of Hobart*, 73 F.3d 283, 286 (10th Cir. 1996). There are two requirements for liability based on custom: (1) the custom must be attributable to the county through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of, and the moving force behind, the constitutional deprivation.

The Court has liberally construed the allegations in the amended complaint in the light most favorable to Plaintiff as required by *Haines v. Kerner*. The excerpts of Plaintiff's sworn statement indicate that he is not aware of an unconstitutional policy or custom of the Sheriff's office. There has been no evidence suggestive of an unconstitutional policy or custom.

To the extent that Plaintiff's allegations concerning the food service at the jail can be read as an unconstitutional policy or custom, the Court finds that there is no support in the record for Plaintiff's allegations of improper food handling practices within the jail. Food service and dietary requirements are specific categories on the state jail inspection checklist, the jail inspection reports dated August 21, 1995, and March 4, 1996, before and after Plaintiff's stay in the Mayes County Jail[2] indicate that the jail was in compliance with

[2] Plaintiff was held in the Mayes County Jail from September 6, 1995, to December 14, 1995.

food handling practices. [Dkt. 91-49; Ex. W]. The only problem noted within the food handling and dietary requirements category for either inspection was "sanitation standards" on the August 21, 1995, inspection. However, neither food and facility sanitation nor food handler sanitation were noted as problems. According to the Report, this particular item was noted because the walls needed to be cleaned and repainted, which was done by the time the next inspection occurred on March 4, 1996. [Dkt. 91-49, p. 16]. There were no problems noted within the food handling and dietary requirements category on the March 4, 1996, jail inspection report.

Plaintiff's allegation as elaborated in his sworn statement that he got a "little bit" sick, "just upset stomach" [Dkt. 91-49, Ex. R, p. 95-96] from greasy food served in the jail does not rise to a violation of his right as a pre-trial detainee to be free from conditions which amount to punishment or otherwise violate the Constitution. *See Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 1872, 60 L.Ed.2d 447 (1979).

Defendant Berry is GRANTED summary judgment in his official capacity as Sheriff of Mayes County.

CONCLUSION

The Defendants' motion for summary judgment, Docket Number 62 in Case Number 96-CV-91-K, which addresses the allegations in Plaintiff's amended complaint in Case Number 96-CV-480-B is GRANTED IN PART AND DENIED IN PART, as follows:

1) Summary judgment is GRANTED to Defendant Harold Berry, Sheriff of Mayes County, in his individual and official capacity;

2) Summary judgment is GRANTED to Defendant Carl Sloan in his individual and official capacity;

3) Summary judgment is DENIED to Defendant George Klatt as to Plaintiff's claim of failure to provide medical care; summary judgment is GRANTED as to all other allegations.

The Court directs the officials responsible for the Mayes County Jail to file a supplemental Special Report in Case Number 96-CV-480-B which report shall fully address Plaintiff's allegations of inadequate medical care. The report shall contain all records of requests for medical care by Plaintiff and the response thereto; an affidavit by Nurse Wells concerning Plaintiff's claim that she was not notified of his need for medical assistance; all medical records concerning Plaintiff generated during his stay at the Mayes County Jail, including the records generated by the eye doctor Plaintiff refers to; all documentation generated concerning the bullpen disturbance involving Plaintiff; and the full text of Plaintiff's sworn statement and supplemental sworn statement.

The supplemental Special Report and any motion for summary judgment based on its contents is due May 1, 1998.

SO ORDERED this 1ST day of ~~March,~~ Apr. 1998.

Thomas R. Brett
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ADOLFINA DYER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 97-C-451-K(W)**
	)	
DR. FREDERICK NORTHROP,	)	
	)	
Defendant.	)	

ORDER

Having reviewed Plaintiff's Motion for Administrative Closure, and the motion being for good cause shown, it is hereby ORDERED that this matter will be Administratively Closed until June 30, 1998, in accordance with the Settlement Agreement signed to by both parties before Adjunct Settlement Judge Paul Cleary on March 19, 1998.

Terry C. Kern

Judge of the United States District Court

13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 03 1998

JIM AND LAURIE AKIN,

Plaintiff,

v.

DAVID K. HOEL, et al.,

Defendant.

and LEOLA PHILIPS,

Intervening Plaintiff

Case No. 97-CV-907-H

FILED
APR 2 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the status report filed by Defendant United States of America. The United States has filed a report stating that this action cannot proceed because Defendant Jean Akin did not list her interest in the trust at issue here in her bankruptcy proceeding in the United States Bankruptcy Court for the Western District of Texas, San Antonio Division. The United States believes that the bankruptcy proceedings must be reopened before the instant action can proceed. The United States requests that this matter be dismissed pending the outcome of the reopened bankruptcy case.

The Court finds it appropriate to stay this action until the bankruptcy issues are addressed. Therefore, all further proceedings in this action are stayed in order for the matter to proceed in the bankruptcy court. The parties are ordered to provide this Court with a report no later than July 1, 1998, informing the Court of the status of the proceedings in the bankruptcy court.

IT IS SO ORDERED.

This 1st day of April, 1998.

Sven Erik Holmes
United States District Judge

(8)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY L. NEWMAN,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

Case No. 97-CV-184-H(J)

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket # 10).

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. The case is hereby reversed and remanded to permit the Commissioner to properly conduct a Step Four inquiry. If the Commissioner concludes that Plaintiff is disabled at Step Four, the Commissioner should proceed to Step Five.

IT IS SO ORDERED.

This 1st day of ~~March~~ April, 1998.

Sven Erik Holmes
United States District Judge

(11)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

SUNRISE ISLAND, LTD., LIMITED GAMING OF AMERICA, INC,

Debtor,

SUNRISE ISLAND, LTD.,

Appellant,

vs.

GOLDMAN SACHS & COMPANY, FOR THE BENEFIT OF CLAUDE M. BALLARD IRA ACCOUNT NO. 005990189,

Appellee.

ENTERED ON DOCKET

DATE APR 03 1998

Case No. 97-CV-279-K(M)

F I L E D

APR 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

There being no objection, the Court adopts the Magistrate's Report and Recommendation filed January 12, 1998. [Dkt. 3]. **THE COURT ORDERS THAT THIS APPEAL BE DISMISSED** for failure to prosecute as outlined in the Magistrate Judge's Report and Recommendation.

Dated this 31 day of March, 1998.

TERRY C. KERN
U.S. DISTRICT COURT CHIEF JUDGE

(4)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CALVIN L. WHITFIELD,

Plaintiff,

v.

THE HERTZ CORPORATION,
HERTZ RENT-A-CAR,
a Delaware corporation,

Defendant.

ENTERED ON DOCKET
DATE APR 3 1998

Case No. 97-CV-141-H

FILED
APR 2 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

This cause having come before this Court on the Joint Application for Dismissal with Prejudice of the parties, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Plaintiff, and that such claims should be dismissed with prejudice, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice. Each party is to bear its own attorney fees and costs.

So Ordered this 1st day of April, 1998.

United States District Judge

(36)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FOUR-D ENERGY, INC., an Oklahoma corporation,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation; and RALPH ROSS CONSTRUCTION CO., INC., a purported corporate entity,

Defendants.

No. 98-CV-0002 H (M)

FILED

APR 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 03 1998

ORDER OF DISMISSAL WITHOUT PREJUDICE
OF DEFENDANT, RALPH ROSS CONSTRUCTION CO., INC.

The motion of the Plaintiff, FOUR-D ENERGY, INC., requesting dismissal without prejudice of the Defendant, RALPH ROSS CONSTRUCTION CO., INC., having been fully considered by the Court, and it appearing to the Court that said Defendant in its Answer makes no counterclaim against Plaintiff and will not be substantially prejudiced by a dismissal without prejudice; therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the above styled and numbered action shall be and is hereby dismissed without prejudice as to the Defendant, RALPH ROSS CONSTRUCTION CO., INC.

Dated ~~March~~ April 1st, 1998.

HONORABLE SVEN ERIK HOLMES
United States District Judge

Submitted by:

JAMES E. POE, OBA #7198
STEPHEN R. CLOUSER, OBA #1737
Covington & Poe

(10)

111 West 5th, Suite 740
Tulsa, Oklahoma 74103
(918) 585-5537

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEBRA LYNN CLAYTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 96-CV-622-B
	)	(consolidated for pretrial and discovery purposes
HAROLD BERRY, Sheriff of Mayes County,	)	with No. 96-CV-91-K)
	)	
Defendant.	)	

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge filed on January 12, 1998 (Docket 12), in this prisoner's civil rights action pursuant to 42 U.S.C. § 1983. The Magistrate Judge recommends that defendant Berry's motion for summary judgment be denied but that the case be dismissed without prejudice for failure of the plaintiff Debra Lynn Clayton to prosecute. No party filed an objection to the Report. Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

IT IS THEREFORE ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #12) is **adopted and affirmed**, and the plaintiff's complaint is **dismissed without prejudice** for failure to prosecute. Defendant's motion for summary judgment (filed as Dkt. 60 in Case No. 96-CV-91-K) is **denied as moot**.

IT IS SO ORDERED this 1st day of April, 1998.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

13/97

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LAYMON HARRIS, *pro se*

Plaintiff,

vs.

SHERIFF STANLEY GLANZ,

Defendants.

Case No. 94-C-327-B

STIPULATION FOR DISMISSAL

Comes now the Plaintiff, Laymon Harris and the Defendant, Stanley Glanz, Sheriff for Tulsa County and enter into the following agreement.

Plaintiff alleges that as a result of the conduct on the part of defendant which is the basis for this suit he has incurred certain damages. Based upon the review of discovery materials and plaintiff's deposition defendant has agreed without admitting negligence or that any constitutional rights of plaintiff have been violated to compensate plaintiff for damages and losses incurred by him.

The Defendants therefore have agreed to pay a sum of money that has been agreed to by all of the parties in exchange for a dismissal of this suit with prejudice as to all named and/or unnamed defendants.

Wherefore, it is agreed between the parties, pursuant to Rule 41(a)(1) of the FEDERAL RULES OF CIVIL PROCEDURE, that upon the payment of the agreed sum of money, that the plaintiff will dismiss this suit against the Defendants and any other unnamed employees of the Tulsa County Sheriff or Tulsa County, Oklahoma, with prejudice.

Further, that upon the payment of the agreed sum of money, this agreement will constitute a joint motion to dismiss this suit with prejudice.

Fred J Morgan

FRED J. MORGAN, OBA #6386
ASSISTANT DISTRICT ATTORNEY
Attorney for the Defendants
406 County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4875

Laymon L. Harris

LAYMON HARRIS, *pro se*
PLAINTIFF

LAYMON L. HARRIS #141889
MCCLEOD CORR. CTR.
HC 32 BOX 812
ATOKA, OK. 74525

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 95-C-437-B
	)	
MELVIN E. EASILEY, a.k.a. Melvin Easiley, a.k.a. Melvin Eugene Easiley, et al.,	)	
	)	
Defendants.	)	

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial before the Court on March 3, 1998 with Loretta Radford representing Plaintiff United States, Eric B. Bolusky representing Defendants Melvin E. Easiley and Lisa Easiley, and Defendant Donald J. Bahnmaier appearing *pro se*.

A. FINDINGS OF FACT

After hearing the testimony and reviewing the exhibits and other evidence introduced during the trial of this matter, the Court makes the following findings of fact:

1. The United States of America on behalf of its agency, the United States Department of Housing and Urban Development ("HUD") (hereinafter collectively "the United States") is the plaintiff in this case; thus this Court has jurisdiction pursuant to 28 U.S.C. § 1345. The real property which is the subject of this action is located within the jurisdictional confines of the Northern District of Oklahoma and therefore, venue is proper pursuant to 28 U.S.C. §1391.

2. This is a civil action for an in rem judgment and foreclosure of a mortgage on the

following described real property located within the Northern Judicial District of Oklahoma:

> LOT TWENTY-EIGHT (28), BLOCK NINE (9), OF "LOTS 1-7 OF BLOCK 2, LOTS 6-20 OF BLOCK 3, LOTS 4-19 OF BLOCK 4, LOTS 6-20 OF BLOCK 5, AND ALL BLOCKS 6 THROUGH 19 KENDALWOOD IV ADDITION" TO THE CITY OF GLENPOOL, TULSA COUNTY, OKLAHOMA, ACCORDING TO THE RECORD PLAT THEREOF (the "Real Property").

The Real Property is also known as 13621 South Oak Street, Glenpool, Oklahoma.

3. On September 30, 1987, Ernest R. Cuellar and Juanita Cuellar executed and delivered to Oak Tree Mortgage Corporation ("Oak Tree"), their mortgage note in the amount of $77,901.00, payable in monthly installments, with interest thereon at the rate of ten percent per annum. As security for the payment of the mortgage note, Ernest R. Cuellar and Juanita Cuellar, husband and wife, executed and delivered to Oak Tree, a real estate mortgage dated September 30, 1987, covering the Real Property. The mortgage was recorded on October 2, 1987, in Book 5055, Page 1895, in the records of Tulsa County, Oklahoma.

4. On July 1, 1989, Ernest R. Cuellar and Juanita Cuellar, husband and wife, executed a General Warranty Deed to Melvin E. And Denise L. Easiley, husband and wife. The General Warranty Deed was recorded with the Tulsa County Clerk on July 5, 1989, in Book 5192, page 2243. The General Warranty Deed provided in part:

> Parties of the Second Part agree to assume and pay existing Mortgage to Oak Tree Mortgage and/or assigns "Subject, however to a first mortgage in favor of Oak Tree Mortgage Corporation."

Thus, pursuant to the General Warranty Deed, defendants Melvin E. Easiley and Denise L. Easiley became joint obligors and assumptors on the original note and mortgage in favor of Oak Tree.

5. The defendant Melvin E. Easiley [hereinafter "Melvin Easiley"] is also known as

Melvin Easiley and Melvin Eugene Easiley.

6. Defendant Melvin Easiley separated from his wife Denise L. Easily and moved out of the Real Property in January 1990.

7. Melvin and Denise L. Easiley were in default of the above described mortgage note and mortgage in September 1990 when they stopped making monthly payments.

8. On February 28, 1991, Melvin Easiley filed a Petition for Divorce against Denise L. Easiley in the District Court in and for Tulsa County Oklahoma, Case No. FD 91-01212.

9. On March 26, 1991, Oak Tree filed a petition to foreclosure on said Real Property against Melvin E. and Denise L. Easiley and Ernest R. and Juanita Cuellar in the District Court in and for Tulsa County Oklahoma, Case No. CJ 91-1404 for failure to pay monthly installments on the above described mortgage note and mortgage since September 1990.

10. On April 15, 1991, Ernest R. Cuellar and Juanita Cuellar filed a disclaimer in Case No. CJ-91-1404, stating that they "disclaim any and all right, title or interest in the" Real Property.

11. On August 5, 1991, Melvin Easiley, through his counsel Caesar C. Latimer, filed an answer in the foreclosure action asserting the Oak Tree had no right to foreclose on the Real Property "for the reason that an extension of time for payment has been granted to pay and reduce the amount of said mortgage."

12. On July 26, 1991, Oak Tree dismissed its foreclosure action, Case No. CJ-91-1404 without prejudice and assigned the above described mortgage note and mortgage to the United States Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 29, 1991, in Book 5338, page 415,

in the records of Tulsa County, Oklahoma.

13. On July 23, 1991, Denise L. Easiley entered into an agreement with HUD reducing the amount of the monthly installments due under the mortgage note in exchange for HUD's forbearance of its right to foreclose on the Real Property. This agreement was purportedly signed by both Melvin and Denise Easiley. However, Melvin Easiley's signature was forged. Therefore, only Denise L. Easiley was a party to the agreement with HUD. Superseding agreements were reached between Denise L. Easiley and HUD in July 1992, July 1993 and July 1994.

14. On January 29, 1992, a Decree of Divorce was entered in Case No. FD 91-01212 divorcing Melvin Easiley from Denise L. Easiley, and by agreement of the parties, awarding the subject Real Property and assigning responsibility for the mortgage payments to Denise L. Easiley. The Decree of Divorce was formally filed on September 23, 1997.

15. The terms and conditions of the mortgage note and mortgage described above, as well as the terms and conditions of the HUD forbearance agreements have been breached in that Defendant Denise L. Easiley has failed to make monthly installments thereon although payment has been demanded.

16. As a result of the default on the mortgage note and mortgage as well as on the HUD forbearance agreements, the United States filed this foreclosure action on May 15, 1995. At the time of the filing of the foreclosure action, the United States was unaware that Denise L. Easiley had been awarded the subject Real Property as a term of the divorce decree and that Melvin Easiley had no right, title or interest in the Real Property.

17. On March 8, 1996 the Court Clerk entered default against Melvin E. Easiley, Denise L. Easiley and the City of Glenpool.

18. On March 15, 1996, this Court entered a Judgment of Foreclosure for the United States, finding that Defendants Melvin E. Easiley, Denise L. Easiley and the City of Glenpool were in default and foreclosing any interest in the Real Property held by Defendants.

19. The Real Property was sold on August 5, 1996 pursuant to a Marshal's Sale and a Marshal's Deed was issued to the Defendant Donald J. Bahnmaier on November 8, 1996 for good and valuable consideration.

20. On September 4, 1997, Plaintiff United States filed a Motion with Memorandum Brief to Vacate Judgment of Foreclosure, to Vacate Sale, and to Permit Filing Second Amended Complaint on the basis that "Melvin Easiley has informed the Plaintiff, United States of America that he was not served with the foreclosure Complaint in this case." The United States moved to amend the Complaint so that proper service could be made upon Melvin Easiley; to show that Melvin E. Easiley is also known as Melvin Easiley and Melvin Eugene Easiley; and to add Lisa Easiley, the current spouse of Melvin Easiley, and Donald J. Bahnmaier as defendants. This Court granted the motion, vacating Judgment of Foreclosure, vacating sale and permitting filing of second amended complaint by its Order of September 15, 1997. On October 3, 1997, the United States filed the Second Amended Complaint.

21. In his Answer to the Second Amended Complaint, Melvin Easiley admitted that the Real Property was conveyed to him and Denise L. Easiley by General Warranty Deed from Ernest R. and Juanita Cuellar but denied being a current assumptor of the subject indebtedness. Melvin and Lisa Easiley also filed counterclaims for fraud and breach of legal and equitable duty against the United States alleging the following: (1) there is no record in the Clerk's Office of Tulsa County indicating that Melvin Easiley is liable to the United States on any mortgage; (2)

despite this, the United States without notice to Melvin Easiley falsely executed agreements exclusively with Defendant Denise L. Easily and concealed such from him; (3) as a result of the United States' concealment and failure to provide him with notice of the foreclosure, the United States prevented him from keeping the Real Property out of foreclosure. Melvin and Lisa Easiley cross-claimed against Denise L. Easiley alleging that "[a]ny judgment rendered against Defendant, Melvin Easiley, concerning the mortgage to Oaktree [sic] Mortgage Corporation dated September 30, 1987, is recoverable from Denise L. Easiley by virtue of the divorce decree dated January 29, 1992, filed September 23, 1997." Melvin Easiley dismissed his cross-claim against Denise L. Easiley on March 3, 1998 during the trial on this matter.

22. At the time HUD executed the assignment program (payment reduction agreement) with Denise L. Easiley in July 1991, Melvin Easiley was no longer residing on the premises. The United States concealed no material facts from Melvin Easiley nor did it defraud Melvin Easiley.

23. Under the terms of the mortgage note and mortgage, upon default in the payments due or breach of any of the conditions, HUD is entitled to declare the balance due and payable immediately, and pursuant thereto, HUD has elected to declare the balance due and payable. As of March 3, 1998, there was due and owing under the mortgage note and mortgage, after full credit for all payments made, the principal sum of $121,539.77, which includes penalty charges in the amount of $1,930.14, plus accrued interest in the amount of $12,569.38, plus interest accruing thereafter at the rate of ten percent per annum until judgment, plus interest thereafter at the legal rate until fully paid.

24. Defendant Lisa Easiley does not claim any right, title or interest in the Real

Property and is named as a defendant solely by virtue of her status as the current spouse of Melvin Easiley.

25. The Defendant City of Glenpool has defaulted in this matter.

26. The Defendant Denise L. Easiley has defaulted in this matter.

27. The Defendant Tulsa County Board of Commissioners does not claim any right, title or interest in the Real Property.

28. The Defendant Tulsa County Treasurer claims $26.00 in unpaid personal property taxes as a lien on the Real Property.

29. The Defendant Donald J. Bahnmaier claims an interest in the Real Property by virtue of a Marshal's Deed, dated November 8, 1996, and recorded on November 19, 1996, in Book 5862, Page 1014, in the records of Tulsa County, Oklahoma. Donald J. Bahnmaier also counterclaims against the United States for damages incurred as a result of vacating the sale of the Real Property to him.

30. The United States concedes the true and proper owner of the subject Real Property is Defendant Donald J. Bahnmaier.

31. The Defendant Melvin Easiley was erroneously offered, prior to trial, the equitable right of redemption and rejected that offer.

B. CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. §1345 and venue is proper pursuant to 28 U.S.C. §1391.

2. Any Finding of Fact above which might be properly characterized a Conclusion of

Law is incorporated herein.

3. As of January 29, 1992, Defendant Melvin Easiley ceased to have any equitable right of redemption to the Real Property. On said date, the Real Property was conveyed to Denise L. Easiley by minute order and a Final Decree of Divorce signed and dated by the Tulsa County District Court in Case No. FD 91-01212 and filed in the court records on September 23, 1997.

4. Although Plaintiff United States filed the Second Amended Complaint to cure any defect in service upon Defendant Melvin Easiley, such was unnecessary as Melvin Easiley did not hold any right, title or interest in the Real Property when the Complaint was originally filed on May 15, 1995 or when the Second Amended Complaint was filed on October 3, 1997.

5. If, however, any equitable right of redemption in Defendant Melvin Easiley survived the conveyance of the Real Property to Denise L. Easiley in the Final Divorce Decree, Melvin Easiley rejected the exercise of such right, and his interest in the Real Property is thus hereby foreclosed.

6. The Defendant Donald J. Bahnmaier's counterclaim against the United States is denied, except insofar as Donald J. Bahnmaier's right, title and interest in the Real Property is hereby recognized.

7. The Court concludes there is no evidence that the United States committed any acts of fraud, concealment or deceit against Melvin Easiley and therefore grants judgment in favor of the Plaintiff United States on Defendant Melvin Easiley's counterclaims.

8. The second foreclosure proceeding in this case was unnecessary as the first foreclosure commenced by the Amended Complaint filed August 15, 1995 was proper regardless

of whether Melvin Easiley was properly served with summons. Denise L. Easiley was properly served with summons in reference to the first foreclosure on September 2, 1995. At that time Melvin Easiley had no right, title or interest in the subject Real Property because the divorce decree of January 29, 1992 vested title in said Real Property in Denise L. Easiley. Thus, service upon Melvin Easiley of the Amended Complaint in the first foreclosure proceeding was not required.

9. Accordingly, the Court vacates and sets aside its Order of September 15, 1997 vacating the judgment of foreclosure and sale of the subject Real Property.

10. The Court orders that all right, title and interest in said Real Property is vested in Defendant Donald J. Bahnmaier by virtue of the Marshal's Deed, dated November 8, 1996, and recorded on November 19, 1996, in Book 5862, Page 1014, in the records of Tulsa County, Oklahoma, nunc pro tunc. The Court hereby quiets title in said Real Property in Donald J. Bahnmaier.

11. The lien of the Tulsa County Treasurer in the amount of $26.00 is hereby acknowledged and ordered as a lien on the subject Real Property.

12. In the event of an appeal of the Order and Judgment in this case, Plaintiff United States and/or Defendant Donald J. Bahnmaier may make a timely application for an appropriate supersedeas bond.

The United States is directed to present a form of Judgment reflecting the Court's findings above on or before April 6, 1998.

IT IS SO ORDERED, this 1st day of April, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and STUART ANDERSON, Revenue Officer, Internal Revenue Service, Plaintiffs,	)	ENTERED ON DOCKET DATE 4-2-98
v.	)	No. 97-mc-45-H
BRUCE E. KIRALY, Defendant.	)	

ORDER

This matter comes before the Court on Plaintiffs' Motion to strike the hearing to show cause and to dismiss this action. Plaintiffs state that Defendant has complied with the subpoena at issue here, and that this action should be dismissed. Plaintiffs' motion is granted. The hearing set for April 1, 1998 is hereby stricken and this action is hereby dismissed.

IT IS SO ORDERED.

This 31st day of March, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STARVEL M. WILLIAMS,

Plaintiff,

vs.

MARVIN T. RUNYON, Postmaster General of the United States Postal Service,

Defendant.

No.97-CV-915-C

ORDER

Currently pending before the Court is defendant Marvin T. Runyon's motion to dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or alternatively motion for summary judgment, pursuant to Rule 56.

On October 6, 1997, plaintiff Williams filed his complaint alleging race and gender discrimination under the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and 42 U.S.C. § 1981. Plaintiff's present allegations stem from the denial of his grievances which were adjudicated in 1993. At that time, Williams was employed by the United States Postal Service and complained that he was denied opportunities to work overtime due to the Postal Service's decision to bring in "out of section" employees to work overtime. He filed several grievances between 1991 and 1993; all of which were ultimately denied.

Williams now brings suit alleging employment discrimination. Williams asserts that other employees with similar grievances received favorable rulings and were granted compensation including back pay. Williams further asserts that the other employees prevailed in their grievances

solely as a result of race or gender. Additionally, Williams acknowledges his claims would generally be considered untimely, but explains that he only became aware of the alleged discriminatory acts in January 1997.

On January 29, 1998, defendant Runyon filed the present motion to dismiss or in the alternative summary judgment. On February 23, 1998, plaintiff filed his response, and defendant's reply was filed on March 13, 1998. For purposes of this Order the Court will address Runyon's motion to dismiss only.

The standard for dismissing an action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted is well-established in Tenth Circuit precedent. "[I]t must appear beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true. All reasonable inferences must be indulged in favor of the plaintiff, and the pleadings must be liberally construed." Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir.1984)(citations omitted). For the reasons stated below, the Court finds that Williams' complaint must be dismissed for failure to state a claim upon which relief can be granted, even in light of the rigid standards which govern the application of Rule 12(b)(6).

In respect to plaintiff's section 1981 claim, Runyon asserts that dismissal is proper because Title VII preempts section 1981 in that it provides the exclusive remedy to address discrimination complaints in the federal employment sector; this proposition was left unaddressed by plaintiff's response. Considering the overwhelming case law, the Court finds that Title VII does indeed provide the exclusive vehicle for federal employees to bring complaints of race or gender discrimination.

Belhomme v. Widnall, 127 F.3d 1214, 1217 (10th Cir. 1997). Accordingly, William's claim pursuant to section 1981 is dismissed.

Additionally, defendant Runyon seeks dismissal of plaintiff's Title VII action on jurisdictional grounds. Runyon argues that plaintiff's Title VII claim is barred because Williams failed to exhaust his Equal Employment Opportunity ("EEO") administrative remedies in a timely fashion. Runyon maintains that plaintiff's initiation of an EEO investigation was untimely as Williams did not contact the EEO until April 1, 1997, nearly three and a half years after the acts in question: the denial of his 1991 through 1993 grievances. In an attempt to salvage his complaint, Williams urges the Court to apply a discovery rule or notice requirement which would trigger the Title VII time limits upon his learning of the alleged discriminatory act rather than upon the occurrence of said act. In short, Williams asserts that the Title VII time limits should have been tolled until he first learned of the other employees' successful grievances.

"In determining whether an EEO complaint is timely filed, the unlawful employment practice complained of must be precisely identified." Poolaw v. City of Anadarko, Oklahoma, 660 F.2d 459, 465 (10th Cir. 1981)(citing Delaware State College v. Ricks, 449 U.S. 250 (1980)). In the case at bar, this determination is dispositive because such an incident triggers the time limits prescribed for initiating EEO actions. Runyon argues that the time limits started to run when Williams' grievances were denied. Williams, on the other hand, argues that the Title VII time limitations were tolled until he "knew or should have known of the discriminatory conduct of the employer."[1] As authority,

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[1] The Court notes that application of such a discovery rule to Title VII actions would render the statutory time limits meaningless. As the Fourth Circuit so aptly noted while addressing this time limit in respect to a case arising under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34:

An "occurrence" is a discrete event, whereas a plaintiff's acquisition of knowledge

Williams cites an unreported district court case, Lufkin v. Illinois Dept. Of Employment, 1996 WL 563458 (N.D. Ill.), and referrers the Court to three other cases, all originating in the Seventh Circuit. However, Williams failed to provide any controlling Tenth Circuit cases on this issue. While Williams' approach is valid and would save this suit, it simply is not the law of this Circuit. The Tenth Circuit requires "active deception" in order to toll the EEO and Title VII time limits. Biester v. Midwest Health Services, Inc., 77 F.3d 1264, 1267-68 (10th Cir. 1996); Johnson v. United States Postal Service, 861 F.2d 1475, 1481 (10th Cir. 1988). Moreover, the Tenth Circuit, in addressing when the 90 day period to bring suit after denial of an EEO claim began to run, rejected an actual notice requirement and stated that "[i]n the absence of equitable considerations demanding a different result, receipt at a plaintiff's address of the right to sue letter constitutes receipt sufficient to start the running of the time period for filing a discrimination action." Million v. Frank, 47 F.3d 385, 388 (10th Cir. 1995). If [actual notice were required], a plaintiff would be permitted to 'enjoy a manipulable, open ended time extension which could render the statutory limitation meaningless . . . .'" Id. at 388 (quoting Lewis v. Conners Steel Co., 673 F.2d 1240, 1242 (11th Cir. 1982)).

After fully reviewing the pleadings, the Court finds that Williams' most recent Title VII cause of action accrued on June 23, 1993, the date that his last grievance was denied. To reach another

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> is a continuing process. One can never be sure when on that continuum of awareness a plaintiff knew or should have known enough that the limitations period should have begun. A discovery rule thus substitutes a vague and uncertain period for a definite one. Hamilton v. 1st Source Bank, 928 F.2d 86, 88 (4th Cir. 1990).

The Court further notes that this Circuit has adopted the Hamilton analysis as it pertains to a notice requirement prior to the accrual of the Title VII time limit for filing suit. Husley v. K-Mart, 43 F.3d 555, 558-59 (10th Cir. 1994).

conclusion would be inconsistent with the purpose of a statutory time limit in which to file complaints as the Tenth Circuit noted in Million. Id. at 388. This finding requires that the Court also dismiss Williams' Title VII claim ipso facto as the time limit for initiating an EEO action lapsed in 1993. The regulations governing discrimination complaints in the federal employment sector provide that "[a]n aggrieved person must initiate contact with a[n] [EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). Williams did not initiate contact until April 1, 1997, which is clearly untimely absent some "active deception" mandating an equitable tolling of the time limit. Williams argues that the time limit should be tolled until he discovered the alleged discrimination, but does not allege any acts of deception. Timely exhaustion of all administrative remedies is a jurisdictional prerequisite. Benford v. Frank, 943 F.2d 609, 612 (6th Cir. 1991). Thus, if Williams failed to exhaust the administrative remedies in a timely fashion, the Court may not entertain his suit. Khader v. Aspin, 1 F.3d 968, 971 (10th Cir. 1993). Hence, the Court must dismiss Williams' Title VII claim for want of jurisdiction.

In sum, Williams' section 1981 claim is dismissed as such an action is preempted by Title VII and not available to federal employees. Likewise, the Court must dismiss Williams' Title VII claim because he failed to initiate contact with an EEO Counselor within the prescribed time limit.

Accordingly, defendant Runyon's motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) is hereby GRANTED.

IT IS SO ORDERED this 1st day of April, 1998.

H. DALE COOK
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLARIS LOVETT,	)	
	)	Tulsa County
Plaintiff	)	Case No. CJ-97-2949
	)	
vs.	)	Case No. 97CV938 B (W)
	)	
ALEXSIS, INC.,	)	
	)	
Defendant.	)	

ENTERED 4/1/98

FILED
MAR 31 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION FOR DISMISSAL

It is hereby stipulated by Plaintiff and Defendant that the above-entitled action be dismissed without prejudice.

Dated: March 27, 1998.

CLARICE LOVETT

By _____
Mitchell E. Shamas
Attorney for Plaintiff
7030 S. Yale Ave., Suite 600
Tulsa, OK 74136-5709
(918) 496-0994

ALEXSIS, INC.

By _____
Roger N. Butler, Jr.
SECREST, HILL & FOLLUO
Attorneys for Defendant
7134 S. Yale, Suite 900
Tulsa, OK 74136-6342
(918) 494-5905

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KELA MARIE GREGORY,

Plaintiff,

vs.

KARIN GARLAND, individually and in her official capacity as Court Clerk of Mayes County, Oklahoma; REGINA HARRIS, individually and in her official capacity as Deputy Court Clerk of Mayes County, Oklahoma; HAROLD BERRY, individually and in his official capacity as Jail Administrator of Mayes County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS OF MAYES COUNTY, OKLAHOMA,

Defendants.

Case No. 96-C-1171-E

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #8) of the defendants Karin Garland, Regina Harris, Harold Berry, and Board of County Commissioners.

Kela Marie Gregory was arrested and booked into the Mayes County Jail on charges of burglary and conspiracy to commit a felony on January 16, 1996. At her initial appearance on that date she was scheduled for a preliminary hearing on February 23, 1996. She and her three co-defendants, however, through appointed counsel, arranged to enter a voluntary plea of guilty on February 16, 1996. On that date, Ms. Gregory pled guilty and was given a deferred sentence, a fine and community service. Because of a misunderstanding, her co-defendants did not plead at that time, and all four were taken back to jail.

Upon return to the jail, Charlie Rice, the officer who

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accompanied Ms. Gregory and her co-defendants to court, did not tell the dispatcher on duty that Ms. Gregory had pled. Also, apparently because Judge McBride did not order Plaintiff's release, the Deputy Court Clerk, Regina Harris failed to prepare an Order of Release for Plaintiff's release. As a result, Ms. Gregory was not released from jail until February 23, 1996, when she was again taken to court and the Judge asked why she was there.

Ms. Gregory claims her constitutional rights were violated by the extra seven days of incarceration, and brings this suit under §1983 against the County, as well as the Court Clerk, the Deputy Court Clerk, and the Sheriff in their individual capacities. Ms. Gregory also brings state law claims against the defendants for negligence, intentional infliction of emotional distress, and false imprisonment. Defendants seek summary judgment, arguing that there is no evidence that a policy or custom of the county deprived plaintiff of her constitutional rights; that defendants, in their individual capacities are entitled to qualified immunity; and that defendants are exempt from plaintiff's state law claims under the Oklahoma Governmental Tort Claims Act.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v.

Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

I. Sufficiency of Plaintiff's §1983 Claim

Defendants assert, correctly, that, in an official capacity suit under §1983, plaintiff must show that there is an official policy or established custom that caused her to be subjected to a deprivation of her constitutional rights. City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2547, 85 L.Ed. 2d 791 (1985). The defendants also urge that "[i]f the plaintiff asserts the alleged custom or policy comprised a failure to act, he or she must demonstrate the municipality's inaction resulted from deliberate indifference to the rights of the plaintiff." Jenkins v. Wood, 81 F.3d 988, 994 (10th Cir. 1996)(Citations omitted). Based on this law, defendants argue that there is no evidence that Defendants have a policy or custom of detaining people longer than legally required.

With respect to plaintiff's "failure to train" theory,

defendants note that failure to train results in §1983 liability only where the "failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 387, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Defendants note: "In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city. . . ." Id., at p. 390. Defendants then argue that "there is no evidence that the Court Clerk of the Sheriff has either actual or constructive notice of an inadequacy of their training program or supervision and failed to take remedial steps," and therefore deliberate indifference has not been shown.

In countering these arguments, plaintiff does not, in general, dispute the legal principles relied on by defendants. Rather, plaintiff argues that, factually, an issue is raised under the legal standards set forth by defendants. Factually, plaintiff points out that the Court Clerk denies responsibility for the prisoners, that the minute clerk claims to sign releases only on verbal order of the judge, that the judge understands Releases are handled by the clerk's office and a verbal order is only infrequently given, and that the Sheriff states that he would have released plaintiff had the Release been signed on the 16th. Plaintiff argues that the lack of policy concerning the signing of Orders of Release, the prompt filing of plea agreements, the prompt

filing of court minutes, and the timely transmission of these documents to the Sheriff all constitute deliberate indifference on the part of the Court Clerk sufficient for liability under §1983. With respect to the Sheriff, plaintiff argues that the use of a person untrained in court procedures to accompany prisoners to court and inform the dispatcher of their status, the failure to contact the Court clerk or minute clerk to determine the status of a person's case following a court appearance, the failure to keep a log for each prisoner regarding court dates, and the failure to require a copy of all plea agreement to accompany a prisoner back from court all amount to deliberate indifference.

Based on these facts, the Court finds sufficient evidence for a fact finder to conclude that Gregory's extended incarceration was not a mistake on the part of either the minute clerk or the Sheriff's employee accompanying the prisoners. In addition the foreseeability of this result based on what is clearly inadequate procedures in handling prisoners and their paperwork presents a question of fact. Because of these questions of fact as to the existence of a §1983 claim, the Court finds that summary judgment is not appropriate either as to the defendants in their official capacity or as to the Board of County Commissioners. Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989)(the County and the Assessor, in his official capacity are "essentially the same entity").

II. Liability of Individual Defendants

Defendants make two arguments with regard to individual liability. Defendants argue that they are immune from liability

under the doctrine of qualified immunity because there conduct does not violate any "clearly established, statutory, or constitutional rights of which a reasonable person would have known," Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1092), and that they are not individually liable because they did not "personally participate" in the alleged civil rights violation.

In light of the fourteenth amendment to the Constitution, defendants do not, and cannot, seriously contend that 7 days imprisonment after acceptance of a change of plea and entrance of a deferred sentence, when no other charges are pending, does not "violate a clearly established constitutional right of which a reasonable person should have known." Rather, what defendants argue is that personal participation is essential to individual liability in a civil rights claim. Bennet v. Passic, 545 F.2d 1260, 1262-3 (10th Cir. 1976). In this respect, plaintiff clearly fails to state a claim individually against Karin Garland, the Court Clerk, and Harold Berry, the Sheriff.

III. State Law Claims

Defendants last argument pertains to plaintiff's state law claims of negligence, intentional infliction of emotional distress, and false imprisonment. Defendants argue, without any response by plaintiff, that the conduct of defendants in not sufficient to state a claim for intentional infliction of emotional distress and false imprisonment under the standard of McMullen v. City of Del City, 67 O.B.J. 2181, 2182 (April 19, 1996). The Court agrees.

With respect to plaintiff's negligence claims, defendants

argue that they are immune from liability pursuant to Okla. Stat. tit. 51, §155(24). This section provides immunity for "operation. . . of any. . . jail. . . ." Under the authority of Medina v. State of Oklahoma, 871 P.2d 1379 (Okla. 1993), this immunity extends to issues regarding release of a prisoner. Defendants' Motion for Summary Judgment on the state law claims is granted.

Conclusion

Defendants' Motion for Summary Judgment (Docket #8) is **granted** with respect to **Karin Garland**, **individually**, and **Harold Berry**, **individually**, and plaintiff's **state law claims**, and **denied** in all other respects. This case is set for scheduling conference on 4/28/98, at 10:00 a.m.

IT IS SO ORDERED THIS 31st DAY OF MARCH, 1998.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 4-1-98

AARON HABBEN, *pro se*)
)
Plaintiff,)
)
vs.) Case No. 95-CV-1194-H
)
SHERIFF STANLEY GLANZ,)
)
Defendants.)

FILED
APR - 1 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION FOR DISMISSAL

Comes now the Plaintiff, Aaron Habben and the Defendant, Stanley Glanz, Sheriff for Tulsa County and enter into the following agreement.

Plaintiff alleges that as a result of the conduct on the part of defendant which is the basis for this suit he has incurred certain damages. Based upon the review of discovery materials and plaintiffs deposition defendant has agreed without admitting negligence or that any constitutional rights of plaintiff have been violated to compensate plaintiff for damages and losses incurred by him.

The Defendants therefore have agreed to pay a sum of money that has been agreed to by all of the parties in exchange for a dismissal of this suit with prejudice as to all named and/or unnamed defendants.

Wherefore, it is agreed between the parties, pursuant to Rule 41(a)(1) of the FEDERAL RULES OF CIVIL PROCEDURE, that upon the payment of the agreed sum of money, that the plaintiff will dismiss this suit against the Defendants and any other unnamed employees of the Tulsa County Sheriff or Tulsa County, Oklahoma, with prejudice.

Further, that upon the payment of the agreed sum of money, this agreement will constitute a joint motion to dismiss this suit with prejudice.

FRED J. MORGAN, OBA #6386
ASSISTANT DISTRICT ATTORNEY
Attorney for the Defendants
406 County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4875

AARON HABBEN, *pro se*
PLAINTIFF

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 97CV 1076 BU
	)	
Pamella S. Lecouix,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 31st day of March, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Pamella S. Lecouix, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Pamella S. Lecouix, was served with Summons and Complaint on March 2, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Pamella S. Lecouix, for the principal amount of $2,535.80, plus accrued interest of $2,757.04, plus interest thereafter at the rate of 10 percent per annum until judgment, plus filing fees in the amount of

$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

Jerry C. Kern for
United States District Judge
Michael Burrage

Submitted By:

Loretta F. Radford

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/sba

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RASKIN RESOURCES, INC.,

Appellant,

vs.

PATRICK J. MALLOY, III, trustee of the Chapter 7 bankruptcy estate of Raskin Resources, Inc.,

Appellee.

Case No. 96-CV-734-H(J)

REPORT AND RECOMMENDATION

Now before the Court is the "Trustee's Motion to Dismiss Debtor's Appeal" (doc. no. 2) and "Trustee/Appellee's Motion For Relief From Stay and Renewed Motion to Dismiss" (doc. no. 9). For the reasons discussed below, the undersigned recommends that the Trustee's motions be **GRANTED**.

On February 6, 1998, a hearing was held to determine why this appeal on behalf of Raskin Resources, a corporation, should not be dismissed for the same reason that the appeal brought by the Raskin Resources' shareholders was dismissed. See Phyllis M. Raskin, *et al.* v. Patrick Malloy, III and Raskin Resources, Inc., 96-CV-642-H(J) (N.D. Okla.) (which was consolidated with 96-CV-783-H(J)). No one appeared for Appellant at the February 6th hearing. At the time the February 6th hearing was set, however, the docket sheet did not list the current address for Raskin Resources. In other words, Appellant failed to keep the Court properly advised as to its current address.

On March 4, 1998, the undersigned ordered the Clerk to change the docket sheet to show the following address for Appellant, Raskin Resources, Inc.:

Raskin Resources, Inc.
% Howard Raskin
P.O. Box 700546
Tulsa, OK 74170-0546

The Clerk was directed to mail a copy of the March 4, 1998 Order to the above address. See Doc. No. 14.

The undersigned also ordered Appellant to file a brief demonstrating why this appeal should not be dismissed for the same reason that the appeal brought by the Raskin Resources shareholders was dismissed. See Doc. No. 14. To date, Appellant has not complied with the undersigned's order and has not filed a brief in this case. The undersigned finds, therefore, that this case is controlled by the holding in the shareholder lawsuit and this action should be dismissed for substantially the same reasons the shareholder lawsuit was dismissed. See Phyllis M. Raskin, *et al.* v. Patrick Malloy, III and Raskin Resources, Inc., 96-CV-642-H(J) (N.D. Okla.).

Appellant's attorney has withdrawn from this action. See Doc. No. 11. It appears that Howard Raskin, a non-lawyer, is attempting to represent Appellant *pro se*. As a corporation, Appellant cannot proceed with this action *pro se*. See DeVilliers v. Atlas Corp., 360 F.2d 292, 293 (10th Cir. 1966) (holding that a corporation can appear in a court of record only by an attorney at law). Alternatively, this action should be dismissed because Appellant cannot proceed with this appeal *pro se*.

RECOMMENDATION

This bankruptcy appeal should be dismissed:

1. for substantially the same reasons the shareholder lawsuit was dismissed in Phyllis M. Raskin, *et al.* v. Patrick Malloy, III and Raskin Resources, Inc., 96-CV-642-H(J) (N.D. Okla.); and

2. because Appellant cannot proceed with this action *pro se*.

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the mater to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 31 day of March 1998.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 1st Day of April, 1998.

C. Pastrano, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELMO COLE, JR.,

Plaintiff,

vs.

CARL SLOAN, BOB GREEN, and RICK STEPHENS,

Defendants.

No. 96-CV-1189-K

AMENDED JUDGMENT

This matter came before the Court for consideration of the Report and Recommendation of the Magistrate Judge, recommending that the motion for summary judgment of Defendants be granted. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendants, CARL SLOAN, BOB GREEN,and RICK STEPHENS, and against the Plaintiff.

SO ORDERED THIS 31st day of March, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

Leann McLaurin,

Defendant.

Civil Action No. 98CV0055BU

DEFAULT JUDGMENT

This matter comes on for consideration this 30th day of March, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Leann McLaurin, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Leann McLaurin, was served with Waiver and Complaint on February 2, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Leann McLaurin, for the principal amount of $4,906.19 and $3,148.39, plus accrued interest of $2,837.24 and $2,242.63, plus administrative charges in the amount of $46.44 and $10.00, plus interest

thereafter at the rate of 8 percent and 7.51 percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/sba

5/30/98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 31 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

Paul M. Robedeaux,

Defendant.

Civil No. 98CV0048BU(W)

ENTERED ON DOCKET
DATE APR 01 1998

DEFAULT JUDGMENT

This matter comes on for consideration this 30th day of March, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Paul M. Robedeaux, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Paul M. Robedeaux, was served with Summons and Complaint on February 24, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Paul M. Robedeaux, for the principal amount of $3,447.92 and $2,698.31, plus accrued interest of $2,818.72 and $1,354.48, plus interest thereafter at the rate of 12 percent and 8 percent per annum until

(6)

judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

Michael Burrage
United States District Judge

Submitted By:

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/sba

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES AVIATION MUSEUM, INC., an Oklahoma corporation,

Plaintiff,

vs.

NORTHROP GRUMMAN CORPORATION, a Delaware corporation,

Defendant.

Case No. 96-CV-0098-BU

ENTERED ON DOCKET
DATE APR 01 1998

JUDGMENT

This matter was tried before a jury from March 23, 1998 through March 25, 1998, the Honorable Michael Burrage presiding. In accordance with the jury verdict rendered on March 25, 1998, judgment is hereby entered as follows:

In favor of plaintiff, United States Aviation Museum, Inc., and against defendant, Northrop Grumman Corporation, on plaintiff's breach of contract claim, assessing damages as follows:

1. Damages for the cost of the uninstalled avionics equipment in the amount of $706,605.00;

2. Damages for the cost of the preparation of the Aircraft to receive the uninstalled avionics equipment (excluding the cost of airframe assembly of the Aircraft) in the amount of: $240,000.00;

3. Damages for the cost of assembly of the Aircraft, exclusive of any cost of preparation for installation of the avionics equipment, in the amount of $1,379,700.00.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that judgment should be and hereby is entered on behalf of plaintiff, United States Aviation Museum, Inc., and against defendant, Northrop Grumman Corporation, for actual damages in the total amount of $2,326,305.00, with post-judgment interest at the rate of 5.41% per annum until paid.

IT IS SO ORDERED this 30th day of March, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Joel L. Wohlgemuth, OBA #9811
William W. O'Connor, OBA #13200
NORMAN WOHLGEMUTH CHANDLER & DOWDELL
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

ATTORNEYS FOR PLAINTIFF,
UNITED STATES AVIATION MUSEUM, INC.

James L. Kincaid, OBA #5021
Craig W. Hoster, OBA #4384
Colin H. Tucker, OBA #16325
CROWE & DUNLEVY
A Professional Corporation
321 South Boston
500 Kennedy Building
Tulsa, OK 74103
(918) 592-9800

ATTORNEYS FOR DEFENDANT,
NORTHROP GRUMMAN CORPORATION

usam.judgment/pss

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CORINZO SMITH,
SSN: 569-80-7113,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-119-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 31ST day of MARCH, 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CORINZO SMITH,
SSN: 569-80-7113,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,[1]

DEFENDANT.

CASE NO. 97-CV-119-M

ORDER

Plaintiff, Corinzo Smith, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[2] In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine

---

[1] Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

[2] Plaintiff's December 9, 1993 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held August 29, 1995. By decision dated September 21, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on December 2, 1995. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(12)

that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born July 21, 1948 and was 46 years old at the time of the hearing. [R. 42]. He claims to have been unable to work since October 5, 1992 due to a head, neck and upper back injury sustained on that date. [R. 43, 66, 98].

The ALJ determined that Plaintiff has severe impairments consisting of mild disc bulge at C6-7 and post concussion syndrome but that he retained the residual functional capacity (RFC) to perform work-related activities except for work involving lifting over 25 pounds frequently or 50 pounds occasionally or work that requires performance of detailed or complex job instructions. [R.19]. He determined that Plaintiff's past relevant work (PRW) of maintenance worker did not require performance of those precluded activities and found that Plaintiff was not disabled

as defined by the Social Security Act. [R. 19-20]. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that he meets Listing 12.05(C), 20 C.F.R. Pt. 404, Supt. P., App. 1. [Plaintiff's Brief, p. 1].

Listing 12.05 provides as follows:

> 12.05 *Mental Retardation and Autism:* Mental retardation refers to a significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22). (Note: The scores specified below refer to those obtained on the WAIS, and are used only for reference purposes. Scores obtained on other standardized and individually administered tests are acceptable, but the numerical values obtained must indicate a similar level of intellectual functioning.). . . .
>
> The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.
>
> A. Mental incapacity evidenced by dependence upon others for personal needs...; OR
>
> B. A valid verbal, performance, or full scale IQ of 59 or less; OR
>
> C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function; OR
>
> D. A valid verbal, performance, or full scale IQ of 60 through 70, or in the case of autism, gross deficits of social and communicative skills...

20 C.F.R., Pt. 404, Subpt. P, App. 1, § 12.05.

Plaintiff had undergone a Wechsler Adult Intelligence Scale-Revised (WAIS-R) test conducted by Dorothy Millican, Ph.D., on March 30, 1994. [R. 140-141]. The ALJ examined the report, found that it was invalid and determined that Plaintiff's condition does not meet the listing. [R. 15]. For the reasons discussed below, the Court affirms the decision of the Commissioner.

Plaintiff's First Statement of Error

Plaintiff claims his condition meets Listing 12.05(C), that the ALJ improperly rejected the WAIS-R test scores and that he failed to fully develop the record.

To meet or equal Section 12.05(C), one must satisfy a two-part test. First, the claimant must show a valid verbal, performance, or full scale I.Q. score on the WAIS-R scale of 60 to 69. He or she must also exhibit a physical or other mental impairment imposing additional and significant work-related limitation of function. See *Ellison v. Sullivan*, 929 F.2d 534, 536 (10th Cir. 1990). The question of whether a claimant meets or equals a listed impairment is strictly a medical determination. 20 C.F.R. §§ 404.1526(b), 416.926(b); *Ellison*, p. 536.

Dr. Millican reported that the results of Plaintiff's performance on the testing placed him in the mildly mentally deficient range of intellectual functioning with a full scale IQ of 66 and performance IQ of 66. His verbal IQ of 70 placed him in the borderline range of intellectual functioning. Dr. Millican stated:

> Mr. Smith's degree of cooperation with this examiner is suspect, as at times he would behave as if he didn't understand the instructions or ask the examiner to repeat

> a question. When this examiner did not respond to Mr. Smith's comments of not understanding he often would say "oh yeah, you mean do this" or when this examiner did not repeat the question, Mr. Smith would later repeat the question and say "oh yeah, you said..."
>
> * * *
>
> It is most likely that Mr. Smith's Intellectual functioning is higher than what is reflective of these test scores. Since the injury he sustained was to his left cerebral hemisphere it would be expected that his Performance IQ would be in the average or higher range of intellectual functioning unless of course, Mr. Smith was already mentally deficient prior to his injury. Due to the apparent exaggeration of symptomology precise clinical interpretation is not feasible. It will be important to derive clinical confirmation of injury and brain functioning.

[R. 140]. The ALJ interpreted these statements to mean the test was not valid and, because "it cannot be determined if the claimant was mentally deficient prior to his injury" [3], found that Plaintiff did not meet the first prong of the listing. [R. 15]. The Court agrees with the ALJ's conclusion that this IQ test cannot be determined to be valid.

Plaintiff implies that his testimony that he completed only the eighth grade and that he cannot read is evidence "regarding the possibility to the claimant was mentally deficient prior to his injury." [sic] [Plaintiff's Brief, p. 3]. There are numerous inconsistencies in the record regarding these contentions. Plaintiff testified at the hearing that the last grade he had finished was the eighth grade. [R.42]. However,

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[3] Plaintiff claims he was struck in the head by "a big plank" and knocked unconscious while working on October 5, 1992. [R. 44, 98].

he stated on his disability report that he had completed high school in 1966. [R. 102]. The medical record contains reports that he quit school in the 10th grade, [R. 130], completed the twelfth grade, [R. 134, 160], or has a "high school education." [R. 144]. Plaintiff also testified at the hearing that he cannot read, even to take down a telephone message. [R. 42-43]. Yet, he later testified that his wife leaves him a list of names of people who might call during the day and instructs him to write the time they called next to their names. [R. 56]. Plaintiff's friend, Claudia Moore, signed statements for the Social Security Administration that she sometimes makes a list for him to go to the store and he "will do OK." [R. 111, 113].

At the hearing, Plaintiff's representative questioned the vocational expert (VE) regarding the possibility of someone who "never acquired the ability to read and write" to "fake their way through certain jobs." [R. 61]. Plaintiff then testified that, in his past work as a carpenter, all that was required of him was the ability to read a measuring tape. [R. 63]. While Plaintiff's representative did not present argument to the ALJ at the hearing that Plaintiff's condition meets the listing, his line of questioning indicates an attempt to establish that Plaintiff could not read because of mental deficiency. Certainly Plaintiff's brief before this Court asserts that this is so. However, there is nothing in the record that indicates Plaintiff claimed inability to read due to mental deficiency prior to the hearing. Rather, the record reflects that, before the hearing, Plaintiff attributed his inability to read to physical problems (double vision and blurred vision) caused by his head injury. [R. 107, 115, 124, 129, 134, 143, 158, 159, 160].

Plaintiff's position is that, if it can be found that he was "already mentally deficient prior to his injury the performance score could be valid." He complains that the ALJ failed in his duty to develop the record by not obtaining evidence of Plaintiff's "preexisting mental state." The Tenth Circuit has discussed at some length the ALJ's duty "to ensure that an adequate record is developed . . . consistent with the issues raised." *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997) (quotation omitted). In particular, *Hawkins* addressed the question: "How much evidence must a claimant adduce in order to raise an issue requiring further investigation?" The Court instructed that some objective evidence in the record must suggest the existence of a condition which could have a material impact on the disability decision requiring further investigation. However, isolated and unsupported comments by the claimant will not suffice to raise the issue. The claimant must in some fashion raise the issue, which on its face must be substantial. The claimant has the burden to make sure the record contains evidence to suggest a reasonable possibility that a severe impairment exists. Once that burden is satisfied, it becomes the ALJ's burden to investigate further. *Id.* Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of Health and Human Servs.*, 13 F.3d 359, 360-61 (10th Cir. 1993). The *Hawkins* Court said that an "ALJ does not have to exhaust every possible line of inquiry in an attempt to pursue every potential line of questioning. The standard is one of reasonable good judgment." 113 F.3d at 1168. Applying this precept, the

Court finds that the ALJ exercised reasonable good judgment with respect to development of the record. There was no objective medical evidence in the record that suggests Plaintiff had a mental deficiency prior to his alleged head injury and, at any rate, the ALJ determined that Plaintiff could do the work he had performed successfully prior to the date he alleged he incurred a head injury. Because substantial evidence supports the ALJ's conclusion that Plaintiff's WAIS-R scores were not valid as contemplated by the listings, his conclusion that Plaintiff's mental impairment did not meet a listing is supported by substantial evidence.

Plaintiff's Second Statement of Error

Plaintiff contends the residual functional capacity (RFC) assessment determined by the ALJ is not supported by the evidence. He asserts the ALJ rejected the opinions of Plaintiff's treating physicians in determining Plaintiff able to work.

Plaintiff had worked for approximately 20 years in carpentry and maintenance before his head injury in 1992. [R. 46, 102]. He claims he was hit in the head by a wood brace and knocked unconscious in 1992. [R. 44, 98]. He told Dr. Blake he was taken to the emergency room at Muskogee Regional Medical Center. [R. 129]. However, there is no such record in the file. The earliest medical report in the record is that of E.P. Couch, M.D., dated November 18, 1992. [R. 152]. No mention is made in that report of a head injury, although a well healed scar was noted in 1994 by other examining physicians. [R. 135, 144]. After his October 1992 injury, Plaintiff was treated for neck, back and left ribs complaints. [R. 152]. An MRI performed on November 9, 1992, was limited by patient motion, but showed some mild bulging or

spondylosis at C6-7. Dr. Couch released Plaintiff to return to work on December 1, 1992. *Id.*

Varsha Sikka, M.D., whose findings Plaintiff contends "were consistent with the rest of the medical evidence", [Plaintiff's Brief, p. 4], reported tenderness in the cervical area but no spasm and normal range of motion on November 29, 1994. [R. 143-149]. Her impression upon examination was "[p]ost concussive syndrome with exaggerated behavior"; [c]hronic pain syndrome with several perpetuating factors"; and, "[n]icotine habit." [R. 145-146]. Dr. Sikka wrote that Plaintiff's "psychological report and his EEG are noted and are normal." Lifting and carrying restrictions were assessed on the basis of limited range of motion and pain in Plaintiff's right shoulder, [R. 147]. She recommended he consider light duty work or sedentary type work. [R. 146]. Dr. Sikka's handwritten notes reveal that she based Plaintiff's restrictions on the degree to which his work-related activities in "heavey [sic] or construction work" were affected. [R. 149].

Jim Martin, M.D., rated Plaintiff for workers' compensation benefits at 19% permanently partially impaired as to his "post concussion syndrome" and musculoligamentous injury to the neck on September 23, 1993. [R. 156]. No mention was made of lifting restrictions due to shoulder pain. The ALJ considered the report of Dr. Martin and accorded it proper weight under established legal standards. *Baca v. Dept. Heath and Human Servs.,* 5 F.3d 476, 480 (10th cir. 1993) (Commissioner is not bound by disability determinations made by other agencies).

As stated above, Plaintiff's medical records contain complaints of vision problems noted by several physicians. Other than an EEG performed on July 29, 1993, which was normal, and a CT Head Scan on the same date, which was also normal, no follow-up testing, examination or treatment for visual problems are noted in the medical record. The Court also notes that no complaints of vision problems were recorded by the physician who treated Plaintiff for injuries he reportedly sustained in a car accident on August 7, 1994. [R. 167-170]. In a typewritten note by Ashok Kache, M.D. on November 16, 1994, Plaintiff's past history was noted as significant for an injury to the head. "This was two or three years ago. He received some stitches after the cut. There is no previous shoulder or neck injury. He has no known medication allergies. He has not had any surgeries previously." [R. 170]. Follow-up notes on November 30, 1994, December 7, 1994 and December 14, 1994 by Dr. Kache report temporary relief of neck and shoulder pain after "trigger point injections" and physical therapy three times per week. [R. 167-168]. No mention is made of past or present vision or "post concussion syndrome" related problems. Dr. Kache was unclear as to when and if Plaintiff could return to his previous work in construction.

Despite the lack of evidence to support Plaintiff's claim of inability to do any work, as Defendant has pointed out to the Court, the ALJ's residual functional capacity (RFC) assessment gave Plaintiff the benefit of the doubt. He found Plaintiff has a "mild disc bulge at C6-7 and post concussion syndrome. [R. 19, Finding 2]. He determined Plaintiff's RFC excluded work involving lifting over 25 pounds frequently

or 50 pounds occasionally, or work that requires performance of detailed or complex job instructions. [R. 19, Finding 4]. Based upon the testimony of a vocational expert, the ALJ found that Plaintiff's limitations did not prevent his return to former work as a maintenance worker. [R. 19, Finding 5].

The ALJ is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The Court finds the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

Conclusion

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his determination that Plaintiff did not meet Listing 12.05(C) and that he retained the capacity to return to maintenance work. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 31ST day of MARCH, 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT W. KAPITAN,
SSN: 110-60-8439,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 96-CV-1095-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 31ST day of MARCH, 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROBERT W. KAPITAN

110-60-8439 Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 96-CV-1095-M

ORDER

Plaintiff, Robert W. Kapitan, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

[1] Plaintiff's protectively filed July 7, 1994, (SSI) and September 22, 1994, (DIB) applications for disability benefits were denied and were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held September 14, 1995. By decision dated October 23, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on September 23, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(15)

than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services,* 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born October 27, 1962 and was 32 years old at the time of the hearing. He has a high school education, one year of beauty college, and was a licensed cosmetologist. He formerly worked as a waiter, worked in a hair salon, and as a beauty store manager. He claims to be unable to work as a result of HIV encephalopathy with central nervous system motor changes and AIDS dementia complex, schizophrenia, and fatigue. The ALJ determined that Plaintiff's former job as a beauty store manager involved lifting weights of up to 50 pounds and frequent bending, reaching and standing 8 or more hours a day, and involved heavy stress related to meeting sales objectives. That job was inconsistent with Plaintiff's present ability to perform light work. Referring to the Medical-Vocational Guidelines ("Grids"), 20 C.F.R., Pt. 404, Subpt. P, App. 2, and taking into account Plaintiff's age, education, vocational experience, and ability to perform light work, the ALJ concluded that Plaintiff is not disabled within the meaning of the Social Security Act.

The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

The Court's scheduling order directed Plaintiff to file a brief listing each specific error relied upon on appeal. Rather than doing so Plaintiff's brief states his general disagreement with the ALJ's analysis. He asserts that the ALJ's determination is not supported by substantial evidence and points out several places where he disagrees with the ALJ's interpretation of the medical evidence. Plaintiff's non-specific disagreement with the ALJ's decision is not grounds to remand the case. The Court finds that the ALJ throughly and accurately recounted the medical evidence and provided a reasonable basis for his conclusions.

The ALJ's finding that Plaintiff's alleged mental condition is not severe is supported by substantial evidence. In June 1994, Plaintiff's treating physician, Dr. Beal, referred him to psychologist Dr. Hickman for testing. Although Plaintiff reported psychological difficulties during the neuropsychological evaluation, Dr. Hickman concluded that Plaintiff's HIV-related cognitive, motor and sensory changes were "minor" and that he was not evidencing a significant degree of diffuse cerebral dysfunction. [R. 117]. Dr. Hickman noted that it would be difficult for Plaintiff to maintain competitive vocational performance with his present levels of anxiety, depression and confusion, but in the next sentence stated that Plaintiff should consider a less demanding job than his present position as a beauty supply store

manager. [R. 117-118]. Dr. Hickman's statement indicates his belief that Plaintiff was mentally capable of performing other work.

Plaintiff claims that the ALJ improperly discounted the diagnosis of schizophrenia found in Dr. Beal's records. As the ALJ explained, Dr. Hickman's report discussed the results of an MMPI test he administered to Plaintiff. He noted that inconsistency in responses raised questions as to the validity of the profile and remarked that persons with Plaintiff's profile often receive a diagnosis of schizophrenia. However, Dr. Hickman did not diagnose schizophrenia. The diagnosis of schizophrenia appears throughout Dr. Beal's notes. [R. 127, 131,170, 172, 175, 177, 178, 179]. The treatment note for June 27, 1994, mentions that Dr. Hickman diagnosed schizophrenia [R. 135], and other notes refer to schizophrenia having been diagnosed on June 27, 1994. [R. 127, 172]. As previously discussed, Dr. Hickman did not make such a diagnosis. Furthermore, nowhere in Dr. Beal's notes is there any data or testing to support a diagnosis of schizophrenia. The Court finds that the record supports the ALJ's analysis and findings concerning the alleged schizophrenia.

Plaintiff's argument that the ALJ failed to cite legitimate reasons for discounting Dr. Beal's opinion that he is disabled is without merit. At pages 16 through 18 of the record the ALJ thoroughly discussed the complaints reflected in Dr. Beal's treatment notes, resolution of complaints, Plaintiff's denial of symptoms he claims are disabling, and other information in the treatment notes which he relied upon to discount Dr. Beal's statements concerning Plaintiff's inability to work.

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 31ST day of March, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLAUDE M. SHOCKLEY,
SSN: 447-68-1751,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 96-CV-1191-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 31ST day of MARCH, 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(B)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLAUDE M. SHOCKLEY

447-68-1751 Plaintiff,

vs.

KENNETH S. APFEL,[1]
Commissioner,
Social Security Administration,

Defendant.

Case No. 96-1191-M

ORDER

Plaintiff, Claude M. Shockley, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[2] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26

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[1] Kenneth S.. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Fed.R.Civ.P. 25(d)(1) Kenneth S. Apfel is substituted for Acting Commissioner John J. Callahan as the defendant in this suit.

[2] Plaintiff's July 19, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 31, 1995. By decision dated November 22, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 23, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(14)

F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services,* 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born December 31, 1961, and was 33 years old at the time of the hearing. He has a bachelor's degree in secondary education and formerly worked as a scale operator, grain technician (inspector), short-order cook, clerk-cashier, and loan collector. He claims to be unable to work as a result of stomach problems, bilateral knee pain, and low back pain. The ALJ determined that Plaintiff's former job involved lifting weights of up to 50 pounds and was inconsistent with Plaintiff's present ability to perform sedentary work. Referring to the Medical-Vocational Guidelines ("Grids"), 20 C.F.R., Pt. 404, Subpt. P, App. 2, and taking into account Plaintiff's age, education, vocational experience, and ability to perform sedentary work, the ALJ concluded that Plaintiff is not disabled within the meaning of the Social Security Act. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence because the ALJ failed to properly evaluate his allegations of disabling pain. For the reasons expressed below, the Court holds that the existing record and findings will not support the denial of benefits on the ALJ's stated rationale and, therefore the case must be reversed and remanded.

Plaintiff claimed he was unable to work due to disabling pain. The ALJ determined that Plaintiff's complaints of pain were not wholly credible. Such a decision is entirely within the province of the ALJ as the Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). However, the ALJ's decision must contain an adequate discussion of his credibility analysis. The ALJ's decision in this case does not. The ALJ addressed Plaintiff's complaints of disabling pain in a conclusory fashion. After noting the general regulations and law governing assessments of pain, the ALJ stated that Plaintiff's statements concerning his impairment and its impact on his ability to work are not entirely credible in light of discrepancies between his assertions and information contained in documentary reports, findings made on examination, and claimant's own testimony. [R. 18]. However, the ALJ did not specify what the discrepancies were.

Further, some of the information the ALJ relied upon to discount Plaintiff's credibility was inaccurate. The ALJ noted that a March 1995 MRI showed "some degeneration at L4-5 and L5-S1" and stated that although this is an identifiable source of Plaintiff's claimed back pain, "no further treatment has been recommended." [R. 18-19]. On March 9, 1995, neurosurgeon, James A. Rodgers, M.D., reported that Plaintiff *returns* to his office for review of the MRI scan. [R. 136]. This note suggests that Plaintiff had seen Dr. Rodgers on more than this one occasion, yet the March 1995 report is the only document from Dr. Rodgers in the record. Dr. Rodgers stated: "This gentleman continues to have continuous problems with his low back and episodic worsening of his condition . . . . I speculate that this gentleman might be a candidate for a two-level lumbar arthrodesis including laminectomy and foraminotomy and possible discectomy. Only by solidifying and stabilizing these segments that seem to be unstable, causing his pain, would he realize the benefits of this surgery." *Id.* The report also suggests that further visits to Dr. Rodgers were contemplated, but again, those records are not part of the file.

"[I]t is well settled that administrative agencies must give reasons for their decisions." *Reyes v. Bowen*, 845 F.2d 242, 244 (10th Cir.1988). Here, the ALJ gave his conclusion but did not adequately elaborate on the reasons for his conclusion. The ALJ stated that he was applying the prescribed analytical framework but he did not relate the factors he considered to specific evidence in the record. Consequently, the Court is left to speculate as to what evidence led the ALJ to find claimant's pain was not disabling. The ALJ should have discussed factors such as

"the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence." *Id.*, quoting *Hargis*, 945 F.2d at 1489) (further quotation omitted). Although the ALJ listed some of these factors, he did not explain why the specific evidence relevant to each factor led him to conclude Plaintiff's subjective complaints were not credible. Furthermore, there is evidence that could be viewed as supporting Plaintiff's contention: he has continually sought medical treatment; his use of pain medication for his back condition were found to be contributorv to an upper GI bleed; and his daily activities have been greatly restricted.

This case is similar to *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995) where the Court, finding that the ALJ's opinion contained only conclusory findings concerning pain and credibility, remanded the case for the limited purpose of requiring express credibility findings. As in *Kepler* a limited remand of this case is in order for the Commissioner to make express credibility findings with reference to relevant evidence as appropriate. *See Rainey v. Department of Health & Human Servs.*, 48 F.3d 292, 293 (8th Cir.1995) (remanding for "express determinations regarding [claimant's] credibility"); *Hollis v. Bowen*, 837 F.2d 1378, 1385 (5th Cir.1988) ("Failure to indicate the credibility choices made and the basis for those choices in resolving the crucial subsidiary fact of the truthfulness of subjective symptoms and

complaints requires reversal and remand.") (quotation omitted). Also, as in *Kepler*, the Court does not dictate any result. The remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of the case." *Huston*, 838 F.2d at 1132.

The Court REVERSES the decision of the Commissioner and REMANDS the case for the purpose of making express credibility findings concerning Plaintiff's claim of disabling pain and for any further proceedings the ALJ finds necessary in light of those new findings.

SO ORDERED this 31st day of March, 1998.

Frank H. McCarthy
Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ALMA J. JAMES,

561-68-3454, Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-27-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 30th day of March, 1998.

Frank H. McCarthy
Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

(20)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ALMA J. JAMES

561-68-3454 Plaintiff,

vs.

KENNETH S. APFEL,[1]
Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-27-M

ORDER

Plaintiff, Alma J. James, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits. In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

Plaintiff's February 6, 1992 application for disability benefits was denied after hearing by decision dated June 24, 1993. The Appeals Council remanded the denial to the Administrative Law Judge ("ALJ") for further development of the record, additional hearing, and issuance of a new decision. A second hearing was held May 23, 1995 and by decision dated October 26, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 11, 1996. The decision of the Appeals Council represents the

[1] Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Fed.R.Civ.P. 25(d)(1) Kenneth S. Apfel is substituted for Acting Commissioner John J. Callahan as the defendant in this suit.

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Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born August 8, 1946 and was 48 years old at the time of the second hearing. She has a 10th grade education, a General Equivalency Diploma, and some vocational training in nursing. She formerly worked as a general office clerk, box printer/labeler, receptionist and a manager in training. She claims to be unable to work since August 24, 1990, as a result of headaches, pain in the back, right leg

and foot, limited ability to sit, stand and walk, reflex sympathetic dystrophy affecting her arms and hands, and depression. Plaintiff has a lengthy history of back problems dating back to the early 1970s when she first had a lumbar laminectomy following a work-related injury. She had a second lumbar laminectomy and fusion in 1980 after which her condition improved. She returned to work until 1986 when a case of beer struck her on the head at the convenience store where she worked. Again she improved and resumed working. On August 24, 1990, she sat on a broken office chair at work and wrenched her back in the process of catching herself, which caused the pain and limitations she claims have kept her from working since that time. In February 1995, Plaintiff underwent a third back surgery, decompression laminectomy L4, L5, and S1 roots, removal of 3 wire loops, spinous process of L3, L4, and L5.

The ALJ determined that although Plaintiff is unable to perform her past work, she is not disabled within the meaning of the Social Security Act because she is capable of performing work at the light and sedentary exertional range and jobs within her capabilities exist in the national economy. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) incorrectly determined that she does not meet Listing of Impairment § 1.05C; (2) failed to include limitations

supported in the record in the hypothetical questioning posed to the vocational expert; and (3) failed to perform a proper credibility analysis. For the reasons expressed below, the Court holds that the record does not support the denial of benefits.

The Listing of Impairments describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from performing any gainful activity. Listing § 1.05C. requires the following:

> C. Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:
>
> 1. Pain, muscle spasm, and significant limitation of motion in the spine; and
>
> 2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

20 C.F.R. Pt. 404, Subpt. P., App.1., § 1.05C. The determination of whether a condition meets a listing is based solely on medical findings. *Kemp v. Bowen*, 816 F.2d 1469, 1473 (10th Cir. 1987). It is well-settled that a claimant is required to meet all the specified medical criteria for a listing to apply. See *Sullivan v. Zebley*, 493 U.S. 521, 530, 110 S.Ct. 885, 891, 107 L.Ed.2d 967 (1990).

The ALJ's first hearing decision (January 24, 1993) addressed the applicability of Listing 1.05C, the second decision (October 26, 1995) did not. However, in the second decision, the ALJ "fully and completely, except as inconsistent with the instant decision, adopts and incorporates the statements of evidences [sic] and analysis, but not the findings thereon, as set forth in the January 24, 1993 decision

included in the record at [pages 356-368]." [R. 16]. At the first hearing, the ALJ called Harold Goldman, M.D. to testify as an expert witness. Dr. Goldman reviewed the medical record and testified that he found no evidence of an appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss as required to meet Listing § 1.05C. [R. 53]. In his denial decision, the ALJ accepted Dr. Goldman's testimony as the basis for finding that Plaintiff does not meet Listing § 1.05C. [R. 357-58]. Since over 100 pages of additional medical records were received subsequent to Dr. Goldman's testimony, the ALJ's reliance on Dr. Goldman's opinion concerning the applicability of Listing § 1.05C is no longer supported by substantial evidence. Not every one of Plaintiff's many visits to physicians produced evidence of listing criteria, however, review of the record reveals that the physicians did not conduct tests for the criteria on each visit. Nonetheless, after Dr. Goldman's testimony there is significant medical evidence of the criteria for Listing § 1.05C.

On February 3, 1994, Dr. Kache, a rehabilitation physician whom Plaintiff saw for evaluation of her reflex sympathetic dystrophy documented diminished right ankle reflex. [R. 651]. In November 1994, orthopaedic surgeon, Dr. Mayoza, noted moderate restriction of range of motion in the lumbar spine. Upon his review of lumbar x-rays, Dr. Mayoza noted his belief that Plaintiff has spinal stenosis at the L4 level. He also noted his doubts that Plaintiff could ever return to a pain-free state. [R. 647]. In August 1994, Dr. Trinidad documented reduced lumbar range of motion, hypesthesia (lessened sensitivity to touch) over the medial aspect of the left thigh and

weakness in the lower extremities. [R. 420]. On January 3, 1995, Dr. Mayoza documented decreased sensory perception over the S1 dermatome. [R. 646]. Practically every entry by Plaintiff's family physician, Dr. Duininck, documents pain and on numerous occasions he observed muscle spasms in her back.[2] Dr. Duininck also assessed Plaintiff as having "low back pain with radicular symptoms of the right leg." [R. 646].

It is not the Court's function to weigh this evidence and substitute its judgment for the Commissioner's. The Social Security Act requires the Commissioner to make findings of fact based on the evidence and to discuss the evidence, stating the reasons for any unfavorable decision. 42 U.S.C. § 405(b)(1). The ALJ's decision does not contain specific weighing of the evidence related to the listing requirements. Therefore, the Court cannot assess whether relevant evidence adequately supports the ALJ's conclusion that Plaintiff's impairments do not meet or equal a listed impairment, or whether the correct legal standards were applied to arrive at that conclusion. The decision cannot be affirmed because the ALJ failed to set out his reasons for his determination that Plaintiff's impairments do not meet or equal a listed impairment. *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996).

Plaintiff claims the ALJ's dismissal of the credibility of her pain allegations based upon her "own description of her activities and life style and the discrepancies

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[2] See Record pages 664, 666, 668, 672, 673, 674, 675, 677, 680, 681, 682, 725, 728, 729, 746, 754, 755, 756.

between the plaintiff's assertions and the documentary evidence" is not supported by the record. [Dkt. 13, p. 6]. The Court agrees.

The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). However, to be entitled to such deference the ALJ is required to assess the claimant's allegations of pain employing the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 which require consideration of claimant's signs and symptoms; the nature, duration, frequency, and intensity of the pain; the factors precipitating and aggravating the pain; the dosage, effectiveness, and side effects of the medication taken for relief of pain; the claimant's functional restrictions; and the impact on daily activities.

In this case the ALJ found:

> The claimant's statements concerning her impairments and their impact on her ability to work are not entirely credible in light of the claimant's own description of her activities and life style, discrepancies between the claimant's assertions and information contained in the documentary reports, the reports of the treating and examining practitioners and the claimant's assertions concerning her ability to work.

[R. 17]. The ALJ only generally referred to these factors and did not cite to or discuss specific evidence in the record to support his conclusion. In fact, the record does not support the ALJ's conclusion or the factors he cited.

In a disability report completed March 7, 1992 (before the first hearing), Plaintiff explained:

> I can't sit any length of time without my back hurting and right leg goes to sleep. I have a hard time getting up and down. I can't walk very good with my right leg and I have headaches.
>
> * * *
>
> Back won't let me get up & down. Pain down back down to right leg & foot. Muscle spasms. Burning pain down back down right leg. Very uncomfortable sitting or standing.

[R. 195]. Her activities were listed as follows: "cleaning in moderation, don't handle heavy cleaning, cooking easy meals, grocery shopping, friends will take me or they will do for me if I'm hurting & in pain." [R. 196]. On April 23, 1993, at the first hearing, Plaintiff testified she doesn't really do anything. She's tried vacuuming, but cannot; she walks 100 feet to her mailbox; she doesn't mop; does some exercises her physical therapist has prescribed; has done some swimming for therapy; does dishes using only the top rack of the dishwasher because she can't bend; puts clothes in the washer, but cannot take them out; tried using a riding lawn mower, but had to stop and lie down after 5 minutes. [R. 77-83]. Contrary to the ALJ's assertion, Plaintiff's description of her activities and life style does not evince an ability to work.

The records generated over time by Plaintiff's health care providers do not contradict, but support, her claimed inability to tolerate activity. Plaintiff attended physical therapy several times a week from September 1990 to January 1991. On practically every visit the therapists document muscle tightness, extreme sensitivity to touch, an inability to tolerate massage, limp and pain into her right leg. [R. 242-254].[3] Plaintiff began another round of physical therapy on May 28, 1992. The therapist's report of Plaintiff's description of her own limitations is consistent with her testimony. [R. 331]. A physical therapy progress report dated July 24, 1992, indicates that Plaintiff continued to be seen 2 to 3 times per week. Her therapist reported that an increase in therapy resulted in a severe increase in pain and palpable muscle spasm. The report, addressed to Dr. Duininck, relates her inability to tolerate the therapy and the therapist's opinion that she will not be able to tolerate work activities. [R. 307].

The record does contain opinions expressed by some physicians that Plaintiff could return to work. In January 1991, John W. Hallford, D.O. performed a one-time worker's compensation evaluation and found that Plaintiff could return to work with merely the common sense restriction of avoiding heavy lifting, frequent stooping and bending. [R. 239]. Plaintiff visited orthopaedic surgeon, Dr. Mayoza, several times between November, 1990 and January, 1991. In view of Plaintiff's limited range of

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[3] The physical therapist's observations are corroborated. On December 6, 1990, Plaintiff was examined by neurosurgeon, Dr. Benner, whose worker's compensation evaluation reported a fair amount of radiation into the right groin, range of motion limited by pain; straight leg raising ("SLR") produced pain; and the absence of a right ankle jerk. [R. 235-36].

motion, positive SLR, and complaints of radiating pain, Dr. Mayoza recommended a lumbar myelogram. [R. 260]. The myelogram showed a "large spur at the L1-2 level with ventral defects and some poor filling of the nerve sleeves at L4 and L5 on the left." [R. 258]. Although Plaintiff had positive objective findings, in light of the absence of any neurological deficit, Dr. Mayoza declined to recommend decompression surgery.[4] *Id.* He released Plaintiff to Dr. Duininck's care on January 2, 1991, and recommended that she be allowed to return to work on February 1, 1991. [R. 257].

Despite Dr. Mayoza's opinion that Plaintiff should be able to return to work, she did not. The medical records developed between the first and second hearing continue to document Plaintiff's frequent visits to Dr. Duininck; her continual complaints of back pain which required muscle relaxants and narcotic pain medication; limited activities; objective observations of muscle spasm; and reduced range of motion. [R. 657-687]. Plaintiff also continued to receive frequent physical therapy. [R. 429-646]. Her therapists documented frequent problems related to her reflex sympathetic dystrophy as well as difficulty walking[5] and problems with virtually all activity.

In November 1994 Plaintiff returned to orthopaedic surgeon, Dr. Mayoza, for care. He found moderately reduced range of motion of the lumbar spine and positive

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[4] Plaintiff was also evaluated by Dr. Milo [R. 265], and Dr. Loy [R. 271-275] who were of the opinion that surgery was indicated.

[5] On October 6, 1994 Plaintiff's therapy consisted of walking **one** minute on the treadmill. [R. 445].

right SLR. Despite his 1991 opinion that Plaintiff did not need surgery [R. 257], in February 1995 Dr. Mayoza performed a "decompression laminectomy L4, L5 and S1 with foraminal decompression right L4, L5, and S1 roots, removal of 3 wire loops, spinous process of L3, L4 and L5." [R. 649].

On May 23, 1995, Plaintiff testified at the second hearing concerning her daily activities. She rises about 9:00 eats a bowl of cereal, takes her medicines, lays down for a couple of hours and then is able to function for two to four hours, during which time she performs her prescribed exercises and walks around. [R. 128-29]. One day a week she tries to shop with her sister, but has to stop and rest frequently. [R. 132]. She has a "reacher" to help her pick things up. [R. 133]. She drives only when she has someone with her in case she experiences a problem with her leg or knee [R. 134]. She does no mopping, vacuuming, sweeping, and virtually no dusting; she eats off paper plates and has help with the laundry. [R. 141-43]. Again, contrary to the ALJ's assertion, Plaintiff does not describe an ability to work.

Plaintiff's testimony concerning her pain and limitations are supported, not contradicted, by the reports of her treating physician and physical therapists. Furthermore, the fact that surgery was performed on Plaintiff in February 1995 by Dr. Mayoza who in January 1991 opined that she did not require surgery and could return to work in February of 1991 lends credibility to her complaints of intractable pain dating back to the August 24, 1990, alleged onset of disability. When the entire record is properly analyzed, employing the required credibility factors, there is no

room for doubt that Plaintiff's complaints of pain and inability to tolerate sustained sitting, standing or walking are credible.

The Court notes that on several occasions (8/93, 10/93, 4/94, and 8/94) Plaintiff's treating physician, Dr. Duininck, reported his opinion that Plaintiff was unable to work on a full-time basis. [R. 387, 388, 418, 427]. His opinion is supported by observations recorded in his treatment records. It is well established that the Commissioner must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). The Court finds that Dr. Duininck's opinion is supported by his clinical observations and, although it is inconsistent with some evidence in the record, it is not inconsistent with other *substantial* evidence in the record, and should therefore be accorded controlling weight.

When a decision of the Commissioner is reversed on appeal, it is within the court's discretion to remand either for further administrative proceedings or for an immediate award of benefits. *Ragland v. Shalala*, 992 F.2d 1056,1060 (10th Cir. 1993). "[O]utright reversal and remand for immediate award of benefits is appropriate when additional fact finding would serve no useful purpose." *Dollar v. Bowen,* 821 F.2d 530, 534 (10th Cir. 1987). The facts are fully developed; what is left to do is an appropriate analysis of those facts. Given the indications that Plaintiff meets Listing § 1.05C, her treating physician's supported opinion that she is unable

to work and the objective support in the medical records for her complaints of intractable pain dating back to the onset date of August 24, 1990, an appropriate analysis of the record would necessarily require an award of benefits. Therefore, the Court exercises its discretion pursuant to 42 U.S.C. § 405(g) and REVERSES and REMANDS the case with directions for an immediate award of benefits consistent with this opinion.

SO ORDERED this 30th day of March, 1998.

Frank H. McCarthy
Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD W. ROBERTS,
SSN: 549-78-0228

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-C-309-J

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 31 day of March 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(9)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD W. ROBERTS,
SSN: 549-78-0228

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-C-309-J

ORDER[2/]

Plaintiff, Ronald W. Roberts, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because (1) the ALJ failed to properly evaluate the medical evidence and did not accord appropriate weight to the opinion of the treating physician, (2) the ALJ's conclusions based on the testimony of the vocational expert are erroneous, and (3) Plaintiff meets Listing 1.05(c). For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Administrative Law Judge R. J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled on August 16, 1995. [R. at 12-26]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review. [R. at 6].

(8)

I. PLAINTIFF'S BACKGROUND

Plaintiff was 45 years old at the time of his hearing before the ALJ which occurred on May 31, 1995. [R. at 37]. Plaintiff was electrocuted in 1972 and fell 45 feet. Plaintiff injured his back, right leg, foot, and ankle. [R. at 39]. Plaintiff testified that if he stands for any length of time his leg swells and his back hurts. [R. at 39-40]. Plaintiff additionally stated that he has sleep apnea. [R. at 43].

Plaintiff testified that his back pain was constant, and he was unable to work due to back pain and swelling of his leg. Plaintiff received a 100% disability rating from the Veterans Administration.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

[4/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[5/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ states that Plaintiff does not meet or equal a Listing, but provides no analysis or reference to a Listing or why Plaintiff does not meet or equal it. The ALJ concluded that Plaintiff was capable of performing light and sedentary work. Testimony of a vocational expert indicated that a significant number of jobs in the light

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5/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

and sedentary range existed, with a sit and stand option, to permit Plaintiff to perform substantial gainful activity.

IV. REVIEW

Failure to Discuss Listings

Plaintiff asserts that the ALJ erred in failing to find that Plaintiff met Listing 1.05(C). Listing 1.05 provides:

> Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least three months despite prescribed therapy and expected to last 12 months. With both 1 and 2:
>
> 1. Pain, muscle spasm, and significant limitation of motion of spine; and
>
> 2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.05(C).

Plaintiff argues that he meets Listing 1.05(C). At the hearing before the ALJ, Plaintiff's attorney asserted that Plaintiff met a Listing and referenced particular exhibits which had been submitted to the ALJ. [R. at 75]. The record indicates that Plaintiff does have some limitations due to the injury from his back. However, some exhibits indicate that Plaintiff has no significant range of motion limitation. [R. at 222]. To meet this Listing, an individual must have "significant limitation of motion of [the] spine." The record seems to indicate that Plaintiff would not meet the Listing. However, the ALJ did not discuss the Listings in his opinion. In his decision, the ALJ merely stated that "[a]lthough the claimant's impairments are "severe" by Social

Security definition, they, either singularly or in combination, do not meet or equal the severity of any impairment listed in Appendix 1 . . . . " [R. at 17].

In Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996),[6/] the ALJ did not discuss the evidence or his reasons for determining that the claimant was not disabled at Step Three, or even identify the relevant listing. The ALJ merely stated a summary conclusion that the claimant's impairments did not meet or equal any listed impairment. In Clifton, the Tenth Circuit held that a bare conclusion was beyond any meaningful judicial review. Clifton, 79 F.3d at 1009.

In particular, the Tenth Circuit held as follows:

> Under the Social Security Act,
>
> > [t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.
>
> 42 U.S.C. 405(b)(1). . . .
>
> This statutory requirement fits hand in glove with our standard of review. By congressional design, as well as by administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C.

6/ The Court notes that the ALJ's decision was rendered on August 16, 1995. The Clifton opinion was not issued until March 26, 1996. Thus the ALJ did not have the benefit of the Tenth Circuit's analysis in Clifton at the time the underlying decision was rendered. The record indicates that the decision of the Appeals Council was after the Clifton decision.

> 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."). . . . Rather, we review the [Commissioner's] decision only to determine whether her factual findings are supported by substantial evidence and whether she applied the correct legal standards. . .
>
> In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed Impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

Clifton, 79 F.3d at 1009-10 (internal case citations omitted).

The record seems to indicate that Plaintiff would not meet this Listing. However, this Court simply does not have the authority to make initial judgments and evaluations of the record. Such is the exclusive province of the ALJ. Therefore, the Court concludes that because the record does not contain an adequate discussion of the Listings, this case must be remanded to the Commissioner for further development. On remand, the Commissioner should evaluate Plaintiff's claim that he meets a Listing giving due consideration to the concerns the Tenth Circuit raised in Clifton.

Records from the Veterans Administration

Plaintiff additionally asserts that the ALJ erred by discounting the opinion of the "treating" physicians from the Veterans Administration ("VA"). First, the record is not clear that these physicians can be classified as "treating physicians." Plaintiff saw several doctors at the VA, but the record does not clearly establish a treating relationship. Second, assuming the doctors were Plaintiff's treating physicians, their opinions as to Plaintiff's disability status are not binding on the ALJ. The VA doctors evaluated Plaintiff for the purpose of determining disability with respect to the VA standards. Such a decision is not binding on the ALJ. The ALJ is required to evaluate the medical evidence which the VA doctors developed, but is not required to accept their ultimate opinion as to whether or not Plaintiff is employable.

The Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this order.

Dated this 31 day of March 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

IN RE: COOPER MANUFACTURING CORP., and its Affiliates; CHALLENGER RIG & MANUFACTURING, INC.; COOPER OFFSHORE SYSTEMS, INC.; and COOPER SALES CORP., Debtors,	Case No. 84-01061-W (Chapter 11)
	Adversary No. 94-0282-W
JON A. BARTON, Liquidating Trustee, Plaintiff,	
vs.	Case No. 94-C-901-BU
THE HOME INDEMNITY COMPANY ET AL., Defendants,	
and	
THE HOME INDEMNITY COMPANY, Third-Party Plaintiff,	
vs.	
THE HOLMES ORGANISATION, INC., Third-Party Defendant.	

JUDGMENT

This action came before the Court upon the motion to dismiss of Third Party Defendant, The Holmes Organisation, Inc., which the Court converted to a motion for summary judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that judgment is entered in favor of Third Party Defendant, The Holmes Organisation, Inc., and against Defendant and Third Party Plaintiff, The Home

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Insurance Company, successor in interest to Defendant, The Home Indemnity Company.

Dated at Tulsa, Oklahoma this 30th day of March, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

IN RE: COOPER MANUFACTURING CORP., and its Affiliates; CHALLENGER RIG & MANUFACTURING, INC.; COOPER OFFSHORE SYSTEMS, INC.; COOPER SALES CORP.,	)	Case No. 84-01061-W (Chapter 11)
Debtors.	)	Adversary No. 94-0282-W
JON A. BARTON, Liquidating Trustee,	)	
Plaintiff,	)	
vs.	)	Case No. 94-C-901-BU
THE HOME INDEMNITY COMPANY, et al.,	)	
Defendants.	)	
and	)	
THE HOME INDEMNITY COMPANY,	)	
Third Party Plaintiff,	)	
vs.	)	
THE HOLMES ORGANISATION, INC.,	)	
Third Party Defendant.	)	

ORDER

This matter comes before the Court upon the motion of Third Party Defendant, The Holmes Organisation, Inc. ("Holmes"), for summary judgment pursuant to Rule 56(c), Fed. R. Civ. P. The motion was originally filed as a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P. However, upon review of the motion and upon notice to the parties, the Court, pursuant to Rule 12(b), Fed. R. Civ. P., converted the motion to one for summary judgment.

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Also, before the Court is the motion of Defendant and Third Party Plaintiff, The Home Insurance Company ("Home"), successor in interest to Defendant, The Home Indemnity Company, for leave to file an amended third party complaint pursuant to Rule 15(a), Fed. R. Civ. P. Upon due consideration of the parties' submissions, the Court makes its determination.

Background

Plaintiff, Jon A. Barton ("Barton"), Liquidating Trustee for Cooper Manufacturing Corp. ("Cooper") and its affiliates, filed a complaint against Home and other defendants alleging two claims, one for common law bad faith and the other for violations of the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code Ann. § 17.50 ("DTPA"). Barton's complaint alleged that Cooper designed, manufactured and sold workover drilling rigs; that in early 1984 Cooper notified the owners of its workover rigs that certain of the rigs might contain defects; that numerous claims and lawsuits were initiated against Cooper for damages allegedly arising from the defective rigs; and, as a result of contingent liability from these claims, Cooper was forced to seek bankruptcy protection in July 1984. Barton sought damages for the forced liquidation of Cooper in December 1985.

Barton's complaint specifically asserted that Home was on notice of the rig claims and that Home was "negligent and/or grossly negligent, and acted unreasonably and in bad faith, in failing to acknowledge coverage, failing to investigate the Rig Claims, failing to defend the Trustee, and/or in failing to make

good faith settlement offers with the claimants." Barton's complaint asserted that these actions constituted common law bad faith and violations of the DTPA.

During the proceedings, Home filed a motion for leave to amend its answer, inter alia, to assert third party claims for contribution and indemnity against Holmes. Prior to ruling on Home's motion, the Court ordered the parties to the main action to attend a settlement conference. At this settlement conference, Home reached an agreement to settle Barton's claims against it for a payment of $7.5 million.

Subsequently, the Court granted Home's motion for leave to amend and directed Home to file its amended answer. Home filed its amended answer which included its third party claims of contribution and indemnity against Holmes. In its pleading, Home asserted that it is was entitled to contribution or indemnification from Holmes because any damages sustained by Barton were caused by the wrongdoing and breach of duty by Holmes in failing to communicate any proper notice by Barton to Home. Holmes thereafter filed the instant motion.

Barton's claims against Home and the other defendants have been dismissed pursuant to the settlement agreement. The only remaining claims are Home's third party claims of contribution and indemnity against Holmes.

Discussion

In its motion, Holmes contends that Home cannot maintain an action for contribution and/or indemnity for Barton's bad faith

claim. According to Holmes, a bad faith breach of an insurance contract constitutes an intentional tort. Holmes argues that under applicable law, an intentional tortfeasor has no right to indemnification or contribution from another party. Holmes likewise contends that claims for contribution and indemnity for Barton's deceptive trade practices claim fail as a matter of law since the same intentional acts alleged to support the bad faith claim also support the deceptive trade practices claim. In addition, Holmes contends that even if Barton's indemnity claim were based upon a negligence standard, Home is still not entitled to indemnity because it would not be a party "without fault." Further, Holmes contends that Home may not maintain an action in indemnity because there are no allegations in Barton's complaint that Home's liability to Barton was vicarious. According to Holmes, the right to indemnity could only exist if Home's liability to Barton was vicarious. Holmes contends that it is clear from Barton's complaint that he sought to recover against Home for its own conduct and not on some sort of vicarious liability theory. Because Home's liability to Barton was not premised upon the acts of Holmes, no right to indemnity exists. Holmes further contends that Home may not assert a contribution claim due to Home's settlement in full of Barton's claims and due to its denial of liability. Holmes asserts that under Texas law, a settling defendant can only settle his proportionate share and cannot preserve contribution rights by obtaining a complete release for all other parties or by obtaining an assignment of a plaintiff's

entire claim. Furthermore, it asserts that under Oklahoma law, no right to contribution exists because Home denied all liability and because Holmes cannot be held jointly and severally liable for Barton's claims.

In response, Home contends that Barton's claims for bad faith and deceptive trade practices were not intentional torts. Home asserts that in order to prevail on his claim, Barton was not required to show intentional misconduct. Home asserts that Barton was only required to prove negligent conduct. However, even if the claims could be labeled intentional torts, Home asserts that it can still pursue its claims because it settled Barton's claims without any admission of liability. With no determination of misconduct being made, Home contends that intentional misconduct is a factual issue which Holmes must plead and prove at trial. In addition, Home contends its indemnity claim is not bound by the allegations in Barton's complaint. Home asserts that it can show in this indemnification action that its liability was vicarious in nature even though Barton's complaint does not allege such fact. Home asserts that Holmes was its agent and that Home could be held vicariously liable for Holmes' conduct. Home contends that its potential liability to Barton for the liquidation of Cooper was due to Holmes' failure to forward notice of potential rig claims to Home, its rendering of an opinion of "no coverage" to Cooper and its inducement of Cooper not to forward complaints in the rig claims to Home. In addition, Home contends that its denial of liability does not preclude its contribution claim. It also

contends that Holmes need not be liable to Barton for bad faith in order for Home to obtain contribution. Home asserts that under Oklahoma law, multiple tortfeasors need not be liable under the same theories of liability. It only requires that multiple tortfeasors cause or contribute to the same injuries sustained by a plaintiff.

Initially, the Court notes that both parties have addressed the merits of Home's contribution and indemnity claim under both Oklahoma and Texas law. The Court had previously ruled that Barton's claims against Home and the other defendants were governed by Texas law. However, as to Home's claims against Holmes, Home maintains that Oklahoma law applies. Home contends that under the "most significant relationship" rule, its claims are governed by Oklahoma law rather than Texas law. Holmes has not addressed this issue. Although upon cursory review the comments to section 173 of the Restatement (Second) of Conflicts of Law suggest that Oklahoma law would govern Home's third party claims, the Court finds that it need not decide the applicable law for the claims. The Court concludes that the result would be the same in both states.

Under Texas law, there is no right to indemnity against a defendant who is not liable to a plaintiff. Humana Hosp. Corp. v. American Medical Systems, Inc., 785 S.W.2d 144, 145 (Tex. 1990); Hartford Casualty Ins. Co. v. Walker County Agency, Inc., 808 S.W.2d 681, 689 (Tex.App.- Corpus Christi 1991). In the instant case, Holmes would not be liable to Barton for the claims for common law bad faith and for violations of the DPTA as Holmes does

not owe a duty of good faith and fair dealing to the insured. Natividad v. Alexsis, Inc., 875 S.W.2d 695, 698 (Tex. 1994). Holmes was not a party to the insurance contract. The duty was owed by Home and was non-delegable. Id. Because Holmes could not be held liable to Barton, Home's claim for indemnity fails as a matter of law.

As to the contribution claim under Texas law, the Court finds that such claim is barred as a matter of law. It is undisputed that Home and the other defendants have settled the entirety of Barton's claims. Although Holmes was not named as a defendant in the lawsuit, any claims against Holmes by Barton were released as part of the settlement agreement. However, the settlement agreement also stated that claims by Home against Holmes were not released. In Beech Aircraft Corporation v. Jinkins, 739 S.W.2d 19, 22 (Tex. 1987), the Texas Supreme Court held that a settling defendant who is jointly responsible for personal injuries to a common plaintiff may not preserve contribution rights either by obtaining a complete release for all other parties allegedly responsible or by obtaining an assignment of the plaintiff's entire claim. Given the undisputed facts in this case, the Court concludes, under the authority of Jinkins, that Home cannot recover against Holmes under a contribution claim.

Applying Oklahoma law to Home's indemnity claim, the Court finds that Home cannot seek indemnification from Holmes. Home's claim is premised upon vicarious liability. However, similar to Texas law, the law of Oklahoma provides that an insurance agent, as

a stranger to the insurance contract may not be held liable for breach of the duty of good faith and fair dealing implied into the insurance contract. Timmons v. Royal Globe Insurance Co., 653 P.2d 907, 912 (Okla. 1982). The duty of good faith and fair dealing is owed by the insurance company and is non-delegable. Id. at 914. As one federal court has noted, a party seeking indemnity must plead and prove, inter alia, that the party from whom indemnity is sought is liable to the third party. Albany Insurance Company v. Rose-Tillmann, Inc., 883 F. Supp. 1459, 1467 (D. Or. 1995). Here, Home cannot prove under Oklahoma law that Holmes would be liable for Barton's bad faith and DTPA claims. Consequently, Home is not entitled to indemnification from Holmes as Home is not a party who was "compelled to pay damages because of the tortious act by another." Braden v. Hendricks, 695 P.2d 1343, 1349 (Okla. 1985)(emphasis added).

As to Home's contribution claim under Oklahoma law, the Court finds that the claim is legally insufficient. Under the Uniform Contribution Among Tortfeasors Act, Okla. Stat. tit. 12, § 832, a right of contribution exists when two or more persons become jointly or severally liable in tort for the same injury to a person. As previously discussed, Holmes cannot be held liable to Barton for his bad faith and DTPA claims. Home, however, citing to In re Jones, 804 F.2d 1133, 1142 (10th Cir. 1986), argues that Holmes need not be liable under the same theory of liability for purposes of contribution. Nevertheless, Home has admitted in its briefing and the evidence presented by Holmes shows that Holmes was

an agent of Home. As such, Home cannot show that Holmes owed any duty to Barton for which a breach thereof could result in liability in tort. Hence, Home cannot establish joint or several liability as required to obtain contribution under Oklahoma's contribution statute. Therefore, Home cannot maintain a contribution claim against Holmes under Oklahoma law.

Shortly after filing its last submission in regard to Holmes' summary judgment motion, Home filed a motion requesting leave from the Court to file an amended third party complaint. According to Home, the purpose of the amended third party complaint was to update the allegations, to clarify the contribution and indemnity claims and to state the claims in more detail. The Court has reviewed the proposed amended third party complaint and concludes that Home's motion should be denied. The Court finds that the filing of the amended third party complaint would be futile. In the Court's view, the amended third party complaint would be subject to dismissal and/or summary judgment for the same reasons heretofore discussed. Therefore, the Court declines to Home leave to file its amended third party complaint. Bauchman for Bauchman v. West High School, 132 F.3d 542, 562 (10th Cir. 1997)(motion to amend may be denied as futile when proposed amended complaint would be subject to dismissal for any reason, including that amendment would not survive summary judgment).

Based upon the foregoing, the motion of Third Party Defendant, The Holmes Organisation, Inc., for summary judgment, which was originally filed as a motion to dismiss (Docket Entry #161) is

GRANTED. The motion of Defendant and Third Party Plaintiff, The Home Insurance Company, successor in interest to Defendant, The Home Indemnity Company, to file an amended third party complaint (Docket Entry #171) is **DENIED**. Judgment shall issue forthwith.

ENTERED this 30th day of March, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

IN RE: COOPER MANUFACTURING CORP., and its Affiliates; CHALLENGER RIG & MANUFACTURING, INC.; COOPER OFFSHORE SYSTEMS, INC.; and COOPER SALES CORP., Debtors,	Case No. 84-01061-W (Chapter 11) Adversary No. 94-0282-W
JON A. BARTON, Liquidating Trustee, Plaintiff,	
vs.	Case No. 94-C-901-BU
THE HOME INDEMNITY COMPANY ET AL., Defendants,	
and THE HOME INDEMNITY COMPANY, Third-Party Plaintiff,	
vs. THE HOLMES ORGANISATION, INC., Third-Party Defendant.	

JUDGMENT

This action came before the Court upon the motion to dismiss of Third Party Defendant, The Holmes Organisation, Inc., which the Court converted to a motion for summary judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that judgment is entered in favor of Third Party Defendant, The Holmes Organisation, Inc., and against Defendant and Third Party Plaintiff, The Home

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Insurance Company, successor in interest to Defendant, The Home Indemnity Company.

Dated at Tulsa, Oklahoma this 30th day of March, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

IN RE: COOPER MANUFACTURING CORP., and its Affiliates; CHALLENGER RIG & MANUFACTURING, INC.; COOPER OFFSHORE SYSTEMS, INC.; COOPER SALES CORP.,	)	Case No. 84-01061-W (Chapter 11)
Debtors.	)	Adversary No. 94-0282-W
JON A. BARTON, Liquidating Trustee,	)	
Plaintiff,	)	
vs.	)	Case No. 94-C-901-BU
THE HOME INDEMNITY COMPANY, et al.,	)	
Defendants.	)	
and	)	
THE HOME INDEMNITY COMPANY,	)	
Third Party Plaintiff,	)	
vs.	)	
THE HOLMES ORGANISATION, INC.,	)	
Third Party Defendant.	)	

FILED

MAR 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 01 1998

ORDER

This matter comes before the Court upon the motion of Third Party Defendant, The Holmes Organisation, Inc. ("Holmes"), for summary judgment pursuant to Rule 56(c), Fed. R. Civ. P. The motion was originally filed as a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P. However, upon review of the motion and upon notice to the parties, the Court, pursuant to Rule 12(b), Fed. R. Civ. P., converted the motion to one for summary judgment.

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Also, before the Court is the motion of Defendant and Third Party Plaintiff, The Home Insurance Company ("Home"), successor in interest to Defendant, The Home Indemnity Company, for leave to file an amended third party complaint pursuant to Rule 15(a), Fed. R. Civ. P. Upon due consideration of the parties' submissions, the Court makes its determination.

Background

Plaintiff, Jon A. Barton ("Barton"), Liquidating Trustee for Cooper Manufacturing Corp. ("Cooper") and its affiliates, filed a complaint against Home and other defendants alleging two claims, one for common law bad faith and the other for violations of the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code Ann. § 17.50 ("DTPA"). Barton's complaint alleged that Cooper designed, manufactured and sold workover drilling rigs; that in early 1984 Cooper notified the owners of its workover rigs that certain of the rigs might contain defects; that numerous claims and lawsuits were initiated against Cooper for damages allegedly arising from the defective rigs; and, as a result of contingent liability from these claims, Cooper was forced to seek bankruptcy protection in July 1984. Barton sought damages for the forced liquidation of Cooper in December 1985.

Barton's complaint specifically asserted that Home was on notice of the rig claims and that Home was "negligent and/or grossly negligent, and acted unreasonably and in bad faith, in failing to acknowledge coverage, failing to investigate the Rig Claims, failing to defend the Trustee, and/or in failing to make

good faith settlement offers with the claimants." Barton's complaint asserted that these actions constituted common law bad faith and violations of the DTPA.

During the proceedings, Home filed a motion for leave to amend its answer, inter alia, to assert third party claims for contribution and indemnity against Holmes. Prior to ruling on Home's motion, the Court ordered the parties to the main action to attend a settlement conference. At this settlement conference, Home reached an agreement to settle Barton's claims against it for a payment of $7.5 million.

Subsequently, the Court granted Home's motion for leave to amend and directed Home to file its amended answer. Home filed its amended answer which included its third party claims of contribution and indemnity against Holmes. In its pleading, Home asserted that it is was entitled to contribution or indemnification from Holmes because any damages sustained by Barton were caused by the wrongdoing and breach of duty by Holmes in failing to communicate any proper notice by Barton to Home. Holmes thereafter filed the instant motion.

Barton's claims against Home and the other defendants have been dismissed pursuant to the settlement agreement. The only remaining claims are Home's third party claims of contribution and indemnity against Holmes.

Discussion

In its motion, Holmes contends that Home cannot maintain an action for contribution and/or indemnity for Barton's bad faith

claim. According to Holmes, a bad faith breach of an insurance contract constitutes an intentional tort. Holmes argues that under applicable law, an intentional tortfeasor has no right to indemnification or contribution from another party. Holmes likewise contends that claims for contribution and indemnity for Barton's deceptive trade practices claim fail as a matter of law since the same intentional acts alleged to support the bad faith claim also support the deceptive trade practices claim. In addition, Holmes contends that even if Barton's indemnity claim were based upon a negligence standard, Home is still not entitled to indemnity because it would not be a party "without fault." Further, Holmes contends that Home may not maintain an action in indemnity because there are no allegations in Barton's complaint that Home's liability to Barton was vicarious. According to Holmes, the right to indemnity could only exist if Home's liability to Barton was vicarious. Holmes contends that it is clear from Barton's complaint that he sought to recover against Home for its own conduct and not on some sort of vicarious liability theory. Because Home's liability to Barton was not premised upon the acts of Holmes, no right to indemnity exists. Holmes further contends that Home may not assert a contribution claim due to Home's settlement in full of Barton's claims and due to its denial of liability. Holmes asserts that under Texas law, a settling defendant can only settle his proportionate share and cannot preserve contribution rights by obtaining a complete release for all other parties or by obtaining an assignment of a plaintiff's

entire claim. Furthermore, it asserts that under Oklahoma law, no right to contribution exists because Home denied all liability and because Holmes cannot be held jointly and severally liable for Barton's claims.

In response, Home contends that Barton's claims for bad faith and deceptive trade practices were not intentional torts. Home asserts that in order to prevail on his claim, Barton was not required to show intentional misconduct. Home asserts that Barton was only required to prove negligent conduct. However, even if the claims could be labeled intentional torts, Home asserts that it can still pursue its claims because it settled Barton's claims without any admission of liability. With no determination of misconduct being made, Home contends that intentional misconduct is a factual issue which Holmes must plead and prove at trial. In addition, Home contends its indemnity claim is not bound by the allegations in Barton's complaint. Home asserts that it can show in this indemnification action that its liability was vicarious in nature even though Barton's complaint does not allege such fact. Home asserts that Holmes was its agent and that Home could be held vicariously liable for Holmes' conduct. Home contends that its potential liability to Barton for the liquidation of Cooper was due to Holmes' failure to forward notice of potential rig claims to Home, its rendering of an opinion of "no coverage" to Cooper and its inducement of Cooper nct to forward complaints in the rig claims to Home. In addition, Home contends that its denial of liability does not preclude its contribution claim. It also

contends that Holmes need not be liable to Barton for bad faith in order for Home to obtain contribution. Home asserts that under Oklahoma law, multiple tortfeasors need not be liable under the same theories of liability. It only requires that multiple tortfeasors cause or contribute to the same injuries sustained by a plaintiff.

Initially, the Court notes that both parties have addressed the merits of Home's contribution and indemnity claim under both Oklahoma and Texas law. The Court had previously ruled that Barton's claims against Home and the other defendants were governed by Texas law. However, as to Home's claims against Holmes, Home maintains that Oklahoma law applies. Home contends that under the "most significant relationship" rule, its claims are governed by Oklahoma law rather than Texas law. Holmes has not addressed this issue. Although upon cursory review the comments to section 173 of the Restatement (Second) of Conflicts of Law suggest that Oklahoma law would govern Home's third party claims, the Court finds that it need not decide the applicable law for the claims. The Court concludes that the result would be the same in both states.

Under Texas law, there is no right to indemnity against a defendant who is not liable to a plaintiff. Humana Hosp. Corp. v. American Medical Systems, Inc., 785 S.W.2d 144, 145 (Tex. 1990); Hartford Casualty Ins. Co. v. Walker County Agency, Inc., 808 S.W.2d 681, 689 (Tex.App.- Corpus Christi 1991). In the instant case, Holmes would not be liable to Barton for the claims for common law bad faith and for violations of the DPTA as Holmes does

not owe a duty of good faith and fair dealing to the insured. Natividad v. Alexsis, Inc., 875 S.W.2d 695, 698 (Tex. 1994). Holmes was not a party to the insurance contract. The duty was owed by Home and was non-delegable. Id. Because Holmes could not be held liable to Barton, Home's claim for indemnity fails as a matter of law.

As to the contribution claim under Texas law, the Court finds that such claim is barred as a matter of law. It is undisputed that Home and the other defendants have settled the entirety of Barton's claims. Although Holmes was not named as a defendant in the lawsuit, any claims against Holmes by Barton were released as part of the settlement agreement. However, the settlement agreement also stated that claims by Home against Holmes were not released. In Beech Aircraft Corporation v. Jinkins, 739 S.W.2d 19, 22 (Tex. 1987), the Texas Supreme Court held that a settling defendant who is jointly responsible for personal injuries to a common plaintiff may not preserve contribution rights either by obtaining a complete release for all other parties allegedly responsible or by obtaining an assignment of the plaintiff's entire claim. Given the undisputed facts in this case, the Court concludes, under the authority of Jinkins, that Home cannot recover against Holmes under a contribution claim.

Applying Oklahoma law to Home's indemnity claim, the Court finds that Home cannot seek indemnification from Holmes. Home's claim is premised upon vicarious liability. However, similar to Texas law, the law of Oklahoma provides that an insurance agent, as

a stranger to the insurance contract may not be held liable for breach of the duty of good faith and fair dealing implied into the insurance contract. Timmons v. Royal Globe Insurance Co., 653 P.2d 907, 912 (Okla. 1982). The duty of good faith and fair dealing is owed by the insurance company and is non-delegable. Id. at 914. As one federal court has noted, a party seeking indemnity must plead and prove, inter alia, that the party from whom indemnity is sought is liable to the third party. Albany Insurance Company v. Rose-Tillmann, Inc., 883 F. Supp. 1459, 1467 (D. Or. 1995). Here, Home cannot prove under Oklahoma law that Holmes would be liable for Barton's bad faith and DTPA claims. Consequently, Home is not entitled to indemnification from Holmes as Home is not a party who was "compelled to pay damages because of the tortious act by another." Braden v. Hendricks, 695 P.2d 1343, 1349 (Okla. 1985)(emphasis added).

As to Home's contribution claim under Oklahoma law, the Court finds that the claim is legally insufficient. Under the Uniform Contribution Among Tortfeasors Act, Okla. Stat. tit. 12, § 832, a right of contribution exists when two or more persons become jointly or severally liable in tort for the same injury to a person. As previously discussed, Holmes cannot be held liable to Barton for his bad faith and DTPA claims. Home, however, citing to In re Jones, 804 F.2d 1133, 1142 (10th Cir. 1986), argues that Holmes need not be liable under the same theory of liability for purposes of contribution. Nevertheless, Home has admitted in its briefing and the evidence presented by Holmes shows that Holmes was

an agent of Home. As such, Home cannot show that Holmes owed any duty to Barton for which a breach thereof could result in liability in tort. Hence, Home cannot establish joint or several liability as required to obtain contribution under Oklahoma's contribution statute. Therefore, Home cannot maintain a contribution claim against Holmes under Oklahoma law.

Shortly after filing its last submission in regard to Holmes' summary judgment motion, Home filed a motion requesting leave from the Court to file an amended third party complaint. According to Home, the purpose of the amended third party complaint was to update the allegations, to clarify the contribution and indemnity claims and to state the claims in more detail. The Court has reviewed the proposed amended third party complaint and concludes that Home's motion should be denied. The Court finds that the filing of the amended third party complaint would be futile. In the Court's view, the amended third party complaint would be subject to dismissal and/or summary judgment for the same reasons heretofore discussed. Therefore, the Court declines to Home leave to file its amended third party complaint. Bauchman for Bauchman v. West High School, 132 F.3d 542, 562 (10th Cir. 1997)(motion to amend may be denied as futile when proposed amended complaint would be subject to dismissal for any reason, including that amendment would not survive summary judgment).

Based upon the foregoing, the motion of Third Party Defendant, The Holmes Organisation, Inc., for summary judgment, which was originally filed as a motion to dismiss (Docket Entry #161) is

GRANTED. The motion of Defendant and Third Party Plaintiff, The Home Insurance Company, successor in interest to Defendant, The Home Indemnity Company, to file an amended third party complaint (Docket Entry #171) is **DENIED**. Judgment shall issue forthwith.

ENTERED this 30th day of March, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHARON E. CALVIN, **SSN: 441-74-0360,**	)	
Plaintiff,	)	
v.	)	**Case No. 96-CV-0900-K(E)**
KENNETH S. APFEL, **Commissioner of Social Security,**[1]	)	
Defendant.	)	

PROPOSED FINDINGS AND RECOMMENDATIONS[2]

Plaintiff, Sharon E. Calvin, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of Social Security ("Commissioner") denying plaintiff's application for supplemental security income under the Social Security Act.[3] Plaintiff asserts that the Commissioner erred where (1) substantial evidence did not support the finding of the ALJ that Ms. Calvin was not disabled, specifically in regard to (a) the ALJ's failure to find that plaintiff met Listing 12.04 of the Listing of Impairments, (b) the ALJ's failure to give the required weight to the findings

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[1] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Apfel is substituted for Shirley S. Chater, former Commissioner, as the defendant in this action.

[2] By minute order dated February 5, 1998, this case was referred to the undersigned for all further proceedings in accordance with her jurisdiction pursuant to the Federal Rules of Civil Procedure.

[3] Plaintiff's April 29, 1994 application for disability benefits was denied initially (June 9, 1994) and on reconsideration (July 22, 1994). A hearing before Administrative Law Judge Leslie S. Hauger, Jr. ("ALJ") was held July 28, 1994 in Tulsa, Oklahoma. By decision April 1, 1995, the ALJ entered the findings which are the subject of this appeal. On September 17, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

of plaintiff's treating physician, (c) the ALJ's failure to apply correct legal standards in the course of his evaluation of plaintiff's nonexertional impairments, insofar as the ALJ ignored certain evidence, and (d) the ALJ's mistaken misquotation of medical evidence concerning plaintiff's complaints of hand tremors; (2) the ALJ failed to give sufficient weight to the testimony of a vocational expert concerning the effects of plaintiff's mental impairments on her job prospects; and (3) the ALJ failed to reopen plaintiff's case to an earlier onset date of January 15, 1986. For the reasons discussed below, the undersigned recommends that the District Court **REVERSE** the Commissioner's decision and **REMAND** for further fact-finding.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born September 14, 1945 and lives in Tulsa, Oklahoma. (R. 36-40) Plaintiff completed college, where she obtained a degree in home economics, textiles, and clothing merchandising and a second degree in elementary education. (R. 272) Plaintiff has worked as an elementary school teacher. (Id.) Plaintiff complains of mental impairments and a muscle disorder in her hands and wrists. (R. 71, 85) Plaintiff states that she stopped work as an elementary school teacher in January, 1986. (R. 37)

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of

substantial gainful work in the national economy...." Id., § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.[4]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). The undersigned's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1486 (10th Cir. 1991).

The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 216, 83 L. Ed. 126 (1938)). The search for adequate evidence does not allow the undersigned to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the undersigned must review the record as a whole, and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951).

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[4] Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R. ("the Listings"). Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity ("RFC") to perform his past relevant work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account his age, education, work experience, and RFC--can perform. See Diaz v. Sec. of H.H.S., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his determination to deny benefits at Step Five of the sequential evaluation process. At Step Four, the ALJ had found that plaintiff is impaired by tremors and bipolar disorder which are severe enough to reduce plaintiff's ability to work. (R. 22) But at Step Five, the ALJ determined that plaintiff has the RFC to perform light work of an unskilled nature, if limited to simple repetitive jobs with little stress and no requirement of writing. (Id.) Having determined--based upon plaintiff's impairments, RFC, age, education, and work experience--that there were jobs in the national economy that plaintiff could perform despite her impairments, the ALJ concluded that plaintiff was not disabled under the Social Security Act at any time through plaintiff's last-insured date of December 31, 1991. (Id.)

IV. MEDICAL HISTORY OF PLAINTIFF

Plaintiff's insurance coverage, pursuant to Title II of the Social Security Act, expired on December 31, 1991. Therefore, to receive benefits, she must be found disabled prior to that last-insured date.

Plaintiff was seen by the Knoxville Psychiatric Group beginning in 1978. (R. 178) She was first thought to be exhibiting a cyclothymic disorder. (R. 118) Plaintiff was placed on Sinequan and Valium and seen on a biweekly to monthly basis. Plaintiff was kept on various antidepressants and benzodizepines until August of 1983. (R. 118) Plaintiff was then seen on a weekly basis until 1985 and treated for borderline personality disorder involving hostility, resentment, and poor interpersonal relationships. (R. 118) Beginning in the middle of 1985, plaintiff was seen monthly by the Knoxville Psychiatric Group and received therapy concerning the death of her parents following her third marriage. She remained on Sinequan and Valium. Plaintiff last visited the Knoxville Psychiatric

Group on January 16, 1986, at which time the therapist concluded plaintiff was in good shape with no overt emotional complaints. (R. 119) Plaintiff was advised to maintain her Sinequan and Valium.

On October 1, 1985, plaintiff was seen by Dr. William A. Paulson, who stated that plaintiff complained of "what she calls a tremor of her left hand that is made worse by stress." (R. 116) However, Dr. Paulson stated: "what she has is writer's cramp and that is distinctly aggravated by stress in her case. A lot of times it is not. She does have some fine benign tremor but really very little. Her neurological examination is normal." (R. 116) Two weeks later Dr. Paulson reported that her EEG and CAT scan were normal and his diagnosis continued to be writer's cramp. (R. 113) Dr. Paulson reported that plaintiff had tried Artane, Valiu, Tegretol, Haldol, and Sinemet, and they had been "of some value." (Id.) Dr. Paulson stated that because plaintiff was already on antidepressants and tranquilizers, he was reluctant to treat her further and suggested she experiment with using her right hand to write. (R. 113)

Following a possible suicide gesture, plaintiff was admitted to and treated at the Shawnee Mission Medical Center from March 17, 1986 to April 5, 1986. (R. 96-102) Plaintiff reportedly had become more angry and dissatisfied with her life and had to be restrained to not get a gun and kill herself. (R. 97) Plaintiff was diagnosed with "depression," "probable dependent personality with anxiety," "possible suicidal gesture," and "borderline personality" disorder. (R. 98)

Plaintiff was admitted to the Rainbow Mental Health Facility on July 22, 1986, complaining of depression and anxiety. (R. 106-109) On July 24, 1986, a psychological assessment was performed on plaintiff, with the doctor stating that plaintiff suffers from "severe depression and the

possibility of a thought disorder." (R. 110) According to the doctor, plaintiff's MMPI[5] profile suggested "an individual who is likely to be rather dependent and ineffective," "a likelihood of anxiety, agitation and concerns about loss of control," frequent irritability and resentment, over-sensitivity and suspiciousness of the motives and intentions of others, and avoidance of close interpersonal relationships. (R. 110-111) Plaintiff was released on August 12, 1986 for transfer to the Johnson County Mental Health Center ("Johnson County MHC"). Plaintiff was stated to be at that time no longer expressing thoughts of suicide. (R. 103) Plaintiff's diagnosis upon release was bipolar disorder. She was prescribed lithium, mellaril, and tofranil. (R. 106)

Plaintiff was diagnosed at Johnson County MHC as having schizo affective, bipolar, and borderline personality disorders, severe inability to maintain a personal social support system, significant difficulty coping with basic activities of daily living, and a need for medication to function adequately. (R. 194) On September 8, 1986, plaintiff complained of being bothered by her hands shaking. She repeated this complaint on various occasions throughout Fall, 1986, and raised the possibility that the shakiness was caused by her medication. (R. 190, 191, 195, 196) Plaintiff stated on January 23, 1987 and on February 27, 1987 that her handwriting was not any better. (R. 189)

On April 1, 1987, plaintiff was treated at Johnson County MHC for extreme anxiety and depression. (R. 123) Staff Psychiatrist Dr. Kuldeep Singh noted that plaintiff was perplexed and confused, reported depression with suicidal thoughts, complained of her hands shaking, had noticeable effects of such shaking in her handwriting, and was reclusive, asocial, and withdrawn. (R. 123) Dr. Singh stated that plaintiff was fearful of driving, suspicious of her medications, and claimed that she slept a great deal and found it difficult to maintain her personal hygiene and do routine

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[5] Minnesota Multiphasic Personality Inventory.

household chores. (R. 123) Plaintiff reported to Dr. Singh that she had worked for one day as a substitute, but had not returned because she began having paranoid thoughts about other teachers complaining about her. (R. 123) Dr. Singh concluded: "[i]t is unlikely that Sharon could function in a work environment at this time. Her anxiety, depression, social withdrawal and inability to control fine motor coordination in her hands severely limit her ability." (R. 123) Plaintiff continued treatment at Johnson County MHC, receiving counseling and medications. (R. 124)

On May 26, 1987, an evaluation was done of plaintiff's employability status, and it was concluded that she had good work attitudes, habits, and behaviors, and had a desire to work. (R. 128-129) Based on this evaluation, it was recommended that she participate in (1) a six-week program for supervised re-entry into the work force, or (2) a 13-week program for re-training of clerical skills. (R. 129)

Plaintiff was seen for medication review and individual therapy nine times between May 1, 1987 and October 6, 1987 at Johnson County MHC. (R. 141) On October 6, 1987, Gary Comstock, a social worker and the Outpatient Clinical Supervisor at Johnson County MHC, reported that plaintiff had "become increasingly more fragile. Hospitalization was recently discussed, but declined by the family. We will continue to provide outpatient services, but we do not feel she is employable at this time." (R. 141)

Plaintiff filed an application for disability benefits in 1987, which was denied on October 29, 1987 and not pursued by plaintiff. In the present case, the ALJ stated in his report that "[t]he beginning date for the period under consideration...is October 30, 1987, the day after the date [plaintiff's] previous application was denied." (R. 17-18)

Plaintiff was treated regularly at Johnson County MHC in 1987 and 1988. (R. 149-178) Plaintiff's hands were often reported to be shaky. (R. 159, 161, 162, 173) Plaintiff's medications were constantly being adjusted. On January 7, 1989, plaintiff's husband called the after hours intervention line at Johnson County MHC. Plaintiff told the person answering the call that there was an 80% chance that plaintiff would go through with a plan to commit suicide by overdosing on pills. (R. 158) That same day plaintiff was admitted to the Rainbow Mental Health Facility in a very depressed, suicidal condition. (R. 142-144, 157-158) Plaintiff was discharged on February 8, 1989. (R. 142-144) Dr. Andrietta Enriquez noted in plaintiff's discharge summary that at admission plaintiff could fill out questionnaires despite her claim of limited writing ability. (R. 142) Plaintiff continued to go to therapy for anxiety and depression throughout 1989. (R. 149-156)

At the end of 1989, plaintiff moved to Oklahoma where she continued her mental health treatment at the Family Mental Health Center ("Family MHC"). Plaintiff was diagnosed by Dr. Susan Grayson as having manic bipolar disorder, borderline personality disorder, and a tremor of unspecified etiology. (R. 234) On January 18, 1990, plaintiff was treated for a panic attack and inability to sleep. (R. 230) On June 14, 1990, plaintiff was admitted to Parkside Hospital after threatening to take her own life and her husband's life. (R. 203-206, 245) Plaintiff was released to her home after eleven days at the facility. (R. 203-206) While at the facility, plaintiff's Global Assessment of Functioning ("GAF") was gauged to be 65, indicating mild difficulty in social, occupational, or school functioning.

(R. 206)[6] Plaintiff was diagnosed upon release as having bipolar disorder, depression, and essential tremor. (Id.). Plaintiff continued to receive occasional outpatient treatment and medications during 1990 and 1991. (R. 225-228)

There is evidence that plaintiff continued such treatment after December 31, 1991, her last insured date for purposes of social security benefits. (R. 213-266) Plaintiff's treating physician during a portion of this time period was Dr. Grayson, who issued a report in May, 1995 detailing plaintiff's markedly limited ability to work as a result of her mental disorder. (R. 263-265)

At the ALJ hearing on May 24, 1995, plaintiff testified that the tremor in her hands causes her great difficulty in writing her name. (R. 274) Plaintiff stated that "once in awhile" she hears things, in particular her mother "yakking at [her]," which causes her to experience guilt. (R. 277) Plaintiff stated that she has some feelings of guilt, mood swings, and worthlessness. (R. 275-276) Plaintiff stated that she has trouble concentrating. (R. 276) Plaintiff stated that she has considered suicide, but denied attempting or preparing to commit suicide. (R. 276-277) Plaintiff stated that she takes lithium, benztropine, haloperidol, amitriptyline, and propranolol. (R. 267) Plaintiff claimed that she performs various organized cleaning chores throughout the week and cooks on weekends. (R. 277-

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[6] The court in Irwin v. Shalala, 840 F. Supp. 751 (D. Or. 1993), explained the significance of a GAF score:

> The Global Assessment of Functioning Scale ("GAF") ranges from 90 (absent or minimal symptoms) to 1 (persistent danger of severely hurting self or others, or unable to care for herself). A score between 41 and 50 is defined as manifesting "serious symptoms" (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). . . . A GAF between 51 and 60 is indicative of "moderate symptoms" (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with co-workers).

Id. at 759 n. 5 and n. 6.

278) Plaintiff stated that she can lift a gallon of milk with either hand and sit, stand, and walk without difficulty. (R. 278-279)

V. REVIEW

A. Plaintiff's Mental Impairment

Plaintiff asserts that the ALJ erred in determining that plaintiff's mental impairment did not meet Listing 12.04 of the Listing of Impairments. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04(B). Because the undersigned finds that the ALJ's determination is not supported by substantial evidence and was based on an incorrect application of legal standards, the undersigned recommends that this case be remanded.

When evidence of a disabling mental impairment is presented, the ALJ must evaluate the impairment in accord with the procedure explained in 20 C.F.R. § 404.1520a. Cruse v. Dept. Of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1995); Tibbits v. Shalala, 883 F. Supp. 1492, 1498 (D. Kan. 1995).

> This procedure first requires the [Commissioner] to determine the presence or absence of "certain medical findings which have been found especially relevant to the ability to work," sometimes referred to as the "Part A" criteria [of the Listings]. 20 C.F.R. § 404.1520a(b)(2). The [Commissioner] must them evaluate the degree of functional loss resulting from the impairment, using the "Part B" criteria [of the Listings]. [20 C.F.R.] § 404.1520a(b)(3). To record her conclusions, the [Commissioner] then prepares a standard document called a Psychiatric Review Technique Form (PRT form) that tracks the listing requirements and evaluates the claimant under the Part A and B criteria. See Woody v. Secretary of Health & Human Servs., 859 F.2d 1156, 1159 (3d Cir. 1988); 20 C.F.R. § 404.1520a(d). At the ALJ hearing level, the regulations allow the ALJ to complete the PRT form with or without the assistance of a medical advisor and require the ALJ to attach the form to his or her written decision. Id.

Cruse, 49 F.3d at 617.

The PRT form filled out by the ALJ on August 1, 1995 indicated that plaintiff met Part A of Listing 12.04, but did not meet Part B. For Part B of Listing 12.04, four categories of functional limitations are assessed: (1) activities of daily living;[7] (2) social functioning;[8] (3) concentration, persistence or pace;[9] and (4) deterioration or decompensation in work or work-like settings.[10] 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04(B). In order for plaintiff's mental impairment to be severe enough to meet Part B of Listing 12.04, plaintiff must have sufficient limitation in at least two of the four functional areas mentioned above. The PRT form rates the degree of functional loss for the first two areas (*i.e.*, daily activities and social functioning) as "none," "slight," "moderate," "marked" and "extreme." Only a "marked" or "extreme" rating in these first two areas is sufficient for purposes of Part B of Listing 12.04. The PRT form rates the degree of functional loss for the third area (*i.e.*, concentration, etc.) as "never," "seldom," "often," "frequent" and "constant." Only a "frequent" or

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[7] "*Activities of daily living* include adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for one's grooming and hygiene, using telephones and directories, using a post office, etc." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(1) (italics original).

[8] "*Social functioning* refers to an individual's capacity to interact appropriately and communicate effectively with other individuals. Social functioning includes the ability to get along with others. . . . Social functioning in work situations may involve interactions with the public, responding appropriately to persons in authority, e.g., supervisors, or cooperative behaviors involving coworkers." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(2) (italics original).

[9] "*Concentration, persistence and pace* refer to the ability to sustain focused attention sufficiently long to permit the timely completion of tasks commonly found in work settings." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(3) (italics original).

[10] "*Deterioration or decompensation in work or work-like settings* refers to repeated failure to adapt to stressful circumstances which cause the individual either to withdraw from that situation or to experience exacerbation of signs and symptoms (i.e., decompensation) with an accompanying difficulty in maintaining activities of daily living, social relationships, and/or maintaining concentration, persistence, or pace (i.e., deterioration which may include deterioration of adaptive behaviors). Stresses common to the work environment include decisions, attendance, schedules, completing tasks, interactions with superiors, interactions with peers, etc." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(4).

"constant" rating in this third area is sufficient for purposes of Part B of Listing 12.04. The PRT form rates the degree of functional loss for the fourth area (*i.e.*, decompensation or deterioration) as "never," "once/twice," "repeated" and "continual." Only a "repeated" or "continual" rating in this fourth area is sufficient for purposes of Part B of Listing 12.04. The ALJ rated plaintiff as having moderate restrictions of activities of daily living; slight difficulties in maintaining social functioning; frequent deficiencies of concentration, persistence or pace; and no episodes of deterioration or decompensation in work or work-like settings. (R. 23-25) Thus, according to the ALJ, plaintiff met only one of the four categories of functional limitations set out in Part B of Listing 12.04.

The ALJ had before him evidence of plaintiff's continued treatment for her previously diagnosed and documented mental disorder after December 31, 1991, her last insured date for purposes of social security benefits. (R. 213-266) Among other reports, Dr. Susan Grayson, plaintiff's treating physician, in May of 1995 concluded that plaintiff had marked limitations in areas of understanding and memory, sustained concentration and persistence, social interaction, and adaption. (R. 264-265)[11] In regard to this evidence, the ALJ stated in his report:

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[11] Specifically, Dr. Grayson found plaintiff to be markedly limited in the following areas: the ability to understand and remember very short and simple instructions; the ability to carry out very short and simple instructions; the ability to carry out detailed instructions; the ability to maintain attention and concentration for extended periods; the ability to make simple work-related decisions; the ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of periods; the ability to interact appropriately with the general public; the ability to ask simple questions or request assistance; the ability to accept instructions and respond appropriately to criticism from supervisors; the ability to get along with coworkers or peers without distracting them or exhibiting behavioral extremes; the ability to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness; the ability to be aware of normal hazards and take appropriate precautions; and the ability to set realistic goals or make plans independently of others. (R. 264-265)

> Susan Grayson, M.D., has treated the claimant, however, the evidence shows that she did not treat the claimant on or before December 31, 1991, the date the claimant was last insured for benefits under Title II of the Act. While Dr. Grayson's opinions are valid, they are not applicable to the time under consideration in this decision.

(R. 20)

The ALJ erred in his refusal to consider Dr. Grayson's opinions. It is true that plaintiff has the burden of proving that she was disabled on or before the date of the expiration of her insured status for social security benefits. However, it defied common-sense and relevant case law for the ALJ to treat the last-insured date as a line beyond which no evidence applies. The relevant inquiry is when, if ever, was the onset date of disability.[12] Noncomtemporaneous medical evidence is relevant insofar as it tends to prove whether a claimant was disabled during the insured time period. "In determining whether plaintiff is disabled, evidence of plaintiff's impairments after [her] insured status expired is relevant to whether [she] was disabled prior to its expiration." Davis v. Secretary of Health and Human Servs., 1993 WL 742658, at *13 (W.D. Mich. Sept. 21, 1993) (citing Ellis v. Secretary of Health and Human Servs., 739 F.2d 245 (6th Cir. 1984)); see also Potter v. Secretary of Health & Human Servs., 905 F.2d 1346 (10th Cir. 1990); Ott v. Chater, 899 F. Supp. 550 (D. Kan. 1995).[13] Noncontemporaneous medical evidence is particularly useful in situations where the issue

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[12] Social Security Ruling 83-20 defines the onset date as "the first day an individual is disabled as defined in the Act and the regulations." Ruling 83-20.

[13] The Tenth Circuit's ruling in Potter v. Secretary of Health & Human Servs., 905 F.2d 1346 (10th Cir. 1990) does not supersede this generally-accepted principle. In Potter, the Court refused to find that three post-insured-status medical reports, which were contradicted by other medical evidence and the claimant's own statements, were in and of themselves enough to require reversal of the Commissioner. Id. at 1348-1349. The Court stated the general principle, holding, "[A] treating physician may provide a retrospective diagnosis of a claimant's condition." Id. at 1348. In addressing the sufficiency of the post-insured-status medical reports, the Court went on to state, "A retrospective diagnosis without evidence of actual disability is insufficient." Id. at 1349. Here, there is evidence of actual disability and the relevant question is whether noncontemporaneous evidence may be considered at all.

is not whether an impairment exists, but what the severity of the impairment is. See Basinger v. Heckler, 725 F.2d 1166 (8th Cir. 1984).

The undersigned recommends that this case be remanded to the Commissioner with the direction that plaintiff's mental impairment be evaluated in a manner consistent with the Social Security Regulations and relevant case law. The Commissioner should determine, in accord with Social Security Ruling 83-20, the onset date, if ever, of plaintiff's disability. The Commissioner should also provide a reasonably detailed analysis of the reasons and evidence upon which the ALJ has based his conclusions.[14]

B. Hand Tremors

In regard to plaintiff's hand tremors, the ALJ stated:

> [T]here is no definitive diagnosis of the claimant's alleged tremors. The physical examinations show no neuromuscular basis and the claimant's medication has not been implicated in causing tremors. Nevertheless, the claimant's writing shows some mild problems in forming letters, though they are fully legible. There is no objective evidence showing that the claimant is incapable of using her hands and the evidence shows that the claimant is able to use her hands.

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[14] The ALJ also erred in failing to adequately detail the reasoning of his determination. An ALJ is required by 20 C.F.R. § 404.1520a(c)(4) to detail, in his report, the basis for determining whether a mental impairment is disabling. See Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994). It is difficult, given the short and conclusory explanations made by the ALJ, to reconcile the medical evidence of plaintiff's mental disorders, including the numerous hospitalizations discussed *supra*, with the ALJ's holding that plaintiff did not meet Part B of Listing 12.04. The details provided by the ALJ are simply insufficient or not supported by substantial evidence.

For example, the ALJ found that plaintiff had no episodes of deterioration or decompensation in work or work-like settings. (R. 25). But at the May 24, 1995 hearing, plaintiff told the ALJ that she had attempted to substitute teach, but couldn't continue because of her mental impairment. (R. 284). Plaintiff made a similar statement to Dr. Singh of Johnson County MHC in 1987. (R. 123). Lay evidence of plaintiff's failed attempt to substitute teach, among other difficulties, was also presented through the testimony of plaintiff's husband at the May 24, 1995 hearing. (R. 285-289). If the ALJ had a reason for disregarding these statements, the ALJ was required to explain his reasons in his report. No mention was made of the discrepancy.

(R. 20) Substantial evidence supports the ALJ's conclusions that because of plaintiff's tremors, plaintiff is not able to perform those actions which require fine motor skills, *i.e.* writing, but that she is able to otherwise use her hands, *i.e.* lifting and gripping. Upon remand, the ALJ's determination at Step Five as to whether work exists in significant numbers in the national economy which plaintiff can perform should be made in light of the combined effect of plaintiff's hand-tremor impairment and plaintiff's mental impairment, as assessed upon remand.

*C. **Reopening the October 29, 1987 Denial of Benefits***

According to 20 C.F.R. § 404.988, an initial determination may be reopened (1) for any reason, if requested within twelve months of a determination; or (2) for good cause, if requested within four years of a determination of a Title II claim. As the ALJ noted, plaintiff has missed those deadlines. The ALJ concluded that the October 29, 1987 decision denying benefits is final and binding and, under the doctrine of administrative *res judicata*, prevents relitigation of that claim. Plaintiff, however, citing Social Security Ruling 91-5p, raises the possibility that the deadline for her opportunity to reopen the October 29, 1987 decision is tolled as a result of mental incapacity. The

undersigned recommends that plaintiff is entitled to a review of the effect of her mental impairment on the reopening of the October 29, 1987 decision.[15]

Social Security Ruling 91-5p provides:

> When a claimant presents evidence that mental incapacity prevented him or her from timely requesting review of an adverse determination, decision, dismissal, or review by a Federal district court, and the claimant had no one legally responsible for prosecuting the claim (e.g., a parent of a claimant who is a minor, legal guardian, attorney, or other legal representative) at the time of the prior administrative action, SSA will determine whether or not good cause exists for extending the time to request review. If the claimant satisfies the substantive criteria, the time limits in the reopening regulations do not apply; so that, regardless of how much time has passed since the prior administrative action, the claimant can establish good cause for extending the deadline to request review of that action.
>
> The claimant will have established mental incapacity for the purpose of establishing good cause when the evidence establishes that he or she lacked the mental capacity to understand the procedures for requesting review.
>
> In determining whether a claimant lacked the mental capacity to understand the procedures for requesting review, the adjudicator must consider the following factors as they existed at the time of the prior administrative action:
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> --inability to read or write;
>
> --lack of facility with the English language;
>
> --limited education;
>
> --any mental or physical condition which limits the claimant's ability to do things for him/herself.
>
> If the claimant is unrepresented and has one of the factors listed above, the adjudicator will assist the claimant in obtaining any relevant evidence. The decision as to what constitutes mental incapacity must be based on all the pertinent facts in a

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[15] Generally, a determination not to reopen a previous decision is discretionary and not, as required by 42 U.S.C. § 405(g), a final decision subject to judicial review. See Califano v. Sanders, 430 U.S. 99, 107-109, 97 S. Ct. 980, 985-986, 51 L. Ed. 2d 192 (1977); Nelson v. Secretary of Health and Human Services, 927 F.2d 1109, 1111 (10th Cir. 1990). However, under Sanders, judicial review is proper "where the [Commissioner's] denial of a petition to reopen is challenged on constitutional grounds." Sanders, 430 U.S. at 109, 97 S. Ct. at 986. The deficiency in due process created where mental illness prevents a claimant from understanding her right to pursue the remedies the law affords her is recognized by many Courts of Appeals to be a colorable constitutional claim. See Evans v. Chater, 110 F.3d 1480 (9th Cir. 1997); Young v. Bowen, 858 F.2d 951, 954-955 (4th Cir. 1988); Elchediak v. Heckler, 750 F.2d 892, 894-895 (11th Cir. 1985); Penner v. Schweiker, 701 F.2d 256, 260-261(3d Cir. 1983); Parker v. Califano, 644 F.2d 1199, 1203 (6th Cir. 1981). The Tenth Circuit has only ruled that a claimant's unsupported allegation of mental incapacity is not enough to create a colorable constitutional claim, Nelson, 927 F.2d at 1111, but that Court has yet to address the precise issue presented here, where the claim of mental illness is substantiated by extensive medical evidence.

> particular case. The adjudicator will resolve any reasonable doubt in favor of the claimant.
>
> If the adjudicator determines good cause exists, he or she will extend the time for requesting review and take the action which would have been appropriate had the claimant filed a timely request for review. A finding of good cause will result either in a determination or decision that is subject to further administrative or judicial review of the claim, or a dismissal (for a reason other than late filing) of the request for review, as appropriate.

Ruling 91-5p. It is true that plaintiff is an educated person with the ability to read and write. However, plaintiff was unrepresented by legal counsel in her 1987 application and has shown that she suffered from a medically-documented ailment in 1987 and years preceding. The depression and bipolar disorder from which plaintiff suffers must certainly have affected her "ability to do things for...herself." Id. When asked at the hearing of May 24, 1995 to reopen the previous application, the ALJ stated:

> Well, by statute we can't. The application was filed back on February 20, 1987, the initial denial was June 22, 1987. We have a statutory four-year limitation, so if the -- four years after the initial declination we can't reopen. And so therefore, since this new application is dated in '94, which is some seven years after the initial determination was made, we cannot reopen.

(R. 281-282) When further pressed by plaintiff's counsel as to the requirements of Social Security Ruling 91-5p and the tolling effects of mental incompetence, the ALJ stated, "Well, I'll take it under consideration." (R. 282)

Apparently, the ALJ did not take it under consideration. No mention was made by the ALJ in his report issued August 1, 1995 as to either Social Security Ruling 91-5p or the effect of mental incompetence upon the tolling of the time allowed for requesting a review of plaintiff's prior denial. This omission ignores the requirements of Social Security Ruling 91-5p and, quite possibly, due process. The undersigned recommends that the District Court remand to the Commissioner to

properly consider and determine whether plaintiff's mental impairment in 1987 extends the time for requesting review of the October 29, 1997 decision and, if so, to take the action which would have been appropriate had the claimant filed a timely request for review.

Because of the recommendations made above, the undersigned need not address the remainder of plaintiff's arguments.

CONCLUSION

The undersigned proposes findings that the decision of the Commissioner is *not* supported by substantial evidence and the correct legal standards were *not* applied. Based on the legal and factual issues in this case, the undersigned recommends that the District Court **REVERSE** the decision of the Commissioner and **REMAND** for further fact-finding. Any objection to these proposed findings and recommendations must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992); Niehaus v. Kansas Bar Ass'n., 793 F.2d 1159, 1164-65 (10th Cir. 1986) (superseded by rule on grounds not relevant to holding on waiver).

DATED this 31st day of March, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 1st Day of April, 1998.

L. Schwelke